Petition

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NEAL BLINKEN,

Petititioner

v.

STATE OF MARYLAND,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

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ATTORNEY FOR PETITIONER

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v.

STATE OF MARYLAND,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner, Neal Blinken, respectfully moves this Court to issue a writ of certiorari to review the opinion and judgment of the Court of Appeals of Maryland entered in this case on October 5, 1981.

QUESTIONS PRESENTED

1. Whether a criminal defendant, who tenders a guilty plea pursuant to a plea

agreement, has the absolute right to change his plea to not guilty before the trial court accept the guilty plea?

2. Whether a criminal defendant is deprived of liberty without due process when a trial court, which has tentatively, but not finally, accepted the defendant's tendered guilty plea pursuant to a plea agreement, refuses to allow the defendant to change his plea to not guilty, after telling the defendant he has the right to change his plea prior to the trial court's final and official acceptance of the guilty plea?

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The opinions of the Court of Appeals of Maryland and the Court of Special Appeals of Maryland (the state's intermediate court of appeals) are reported

at ___Md.___, 435 A. 2d 86 (1981) and 46 Md. App. 579, 420 A. 2d 997 (1980), respectively, and appear in the Appendix, infra, at A.1.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on October 3, 1981. A timely motion to reconsider was denied on November 3, 1981,[1] and this petition for certiorari was timely filed thereafter. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in

1. A copy of the reconsideration order appears in the Appendix, infra, at A.67

time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property , without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment - Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Neal Blinken, was indicted on multiple violations of the Controlled Dangerous Substances laws of Maryland. He and his co-defendant, Kari Lou Pfau, appeared before the Maryland Circuit Court for Queen Anne's County on November 1, 1979. On the basis of a plea agreement reached with the State's Attorney, they tendered pleas of guilty to charges of (1) possession of marijuana in sufficient quantity to indicate an intent to distribute, (2) possession of marijuana, (3) possession of cocaine and (4) keeping and maintaining a public nuisance, that is, a dwelling house used by drug abusers as a location in which to administer controlled dangerous substances. Ms. Pfau also tendered a guilty plea to a fifth count of conspiracy to distribute marijuana.

In return for Petitioner's plea of guilty

to the above counts, the State agreed that Ms. Pfau[2] would be given a ten year suspended sentence, five years probation, a $10,000.00 fine and that Petitioner would receive a sentence of ten years' imprisonment and a $50,000.00 fine. The State also agreed to enter a nolle prosequi on the remaining conspiracy counts lodged against Petitioner and Ms. Pfau.

After Petitioner tendered his guilty plea and the plea agreement was presented to the trial court, the trial court stated that it was accepting the pleas "tentatively, but not finally," pending the outcome of a pre-sentence investigation report. The trial court also stated, "You still have a right to withdraw your plea, if you care to do so, anytime before the court finally accepts it."

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2. Petitioner and Ms. Pfau were engaged at the time they tendered their guilty pleas. They are now married.

Moreover, the trial court, in the Certificate of Presiding Judge, wrote in that Petitioner's plea was being only tentatively accepted, and crossed out the language in the form stating that the plea should be entered on the record. (Appendix, infra, at A.69). The trial court then requested that the pre-sentence investigation report be completed by December 15, 1979 and scheduled a sentencing hearing for January 3, 1980.

Prior to the completion of the pre-sentence investigation report, the trial court, on December 12, 1979, received a letter from Petitioner indicating that he wished to withdraw his guilty plea. Petitioner renewed his request to withdraw his guilty plea at the January 3, 1980 hearing. He emphasized his desire to preserve his appellate rights[3] and stated

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3. Petitioner filed two Motions to Suppress in this case, one having been granted (cont.)

that he felt coerced into pleading guilty because the State used his co-defendant and fiancee, Ms. Pfau, as a lever against him. Petitioner explained that the only reason he pleaded guilty was to insure that Ms. Pfau would receive a lenient sentence. The court overruled the motion, stated that it "now finally accepts the plea agreement," and sentenced Petitioner according to the plea agreement reached with the State.

On appeal the the Court of Special Appeals of Maryland, Petitioner contended, among other issues, that the trial court abused its discretion in denying Petitioner's request to change his guilty plea to not guilty. The Court of Special Appeals affirmed Petitioner's conviction, holding that the trial court had not abused its discretion in denying Petitioner's request to change his plea. Upon application

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(suppression of a wiretap) and one having been denied (suppression of a search and seizure warrant.)

to the Court of Appeals of Maryland, the Court issued a writ of certiorari to review his case on the following issues:

1. Whether the trial court abused its discretion by prohibiting Petitioner from withdrawing a tendered guilty plea which had not been finally accepted by the trial court.

2. Whether the trial court, which had tentatively, but not finally, accepted Petitioner's tendered guilty plea pending outcome of a pre-sentence investigation report, abused its discretion by prohibiting Petitioner from witdrawing the guilty plea prior to the trial court's final acceptance after telling Petitioner he would be allowed to withdraw the plea anytime before the trial court finally accepted it.

Although neither of the issues considered by the Court of Appeals were

explicitly couched in terms of federal questions of law, they necessarily embody the Fifth Amendment right against self-incrimination, since a guilty plea is the highest form of self-incrimination, and concepts of fundamental fairness as embodied within the due process clause of the Fourteenth Amendment regarding the trial court's discretion in allowing Petitioner to change his tendered guilty plea.

In affirming Petitioner's conviction, the Court of Appeals held that, regardless if the trial court has actually accepted a tendered guilty plea, where a defendant tenders a guilty plea pursuant to a plea agreement, the defendant is bound by that plea and can change it only at the trial court's discretion. The court also held that the statement by the trial court that, "You still have a right to withdraw your plea, if you care to do so, anytime

before the court finally accepts it," was directed only to Ms. Pfau and not to Petitioner.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BY THE COURT OF APPEALS THAT A DEFENDANT IS BOUND BY A GUILTY PLEA TENDERED PURSUANT TO A PLEA AGREEMENT REGARDLESS IF THE COURT HAS ACCEPTED THE PLEA IS IN CONFLICT WITH DECISIONS OF FEDERAL COURTS OF APPEALS AND OTHER STATE COURTS OF LAST RESORT ON THE ISSUE.

The issue of whether a defendant can change a tendered plea of guilty to not guilty prior to the trial court's acceptance of the guilty plea is an issue which rarely has come before the courts since, in almost all cases dealing with the withdrawal of a guilty plea, the plea has already been accepted by the trial court. However, in at least one decision rendered by a federal court of appeals, United States v. Ocanas, 628 F. 2d 320 (5th Cir. 1980), rehearing denied, 633 F. 2d 582, the court held, at 326, that a defendant who tenders a guilty plea

pursuant to a plea agreement is free to withdraw the plea until the court accepts the plea bargain. Additionally, at least one state court of last resort has by court rule clarified that a defendant has an absolute right to withdraw a guilty plea prior to its acceptace by the trial court. Michigan GCR 1963 785.7(6)(a). Finally, although not faced with issue presently before this court, a number of state courts have recognized that only after a guilty plea has actually been accepted by a trial court is its withdrawal addressed to the discretion of the court. See, for example, State v. Elledge,, 13 N.C. App. 462, 186 S.E. 2d 192 (1972); State v. Hicastro, 41 N.J. Super '84, 125 A. 2d 433 (1956). The conflict in decisions between the Court of Appeals of Maryland and the decisions made by other courts referred to above should be resolved by this Court since the process and correct procedure for tendering and accepting

guilty pleas, particularly pursuant to a plea agreement, is of fundamental importance to the criminal judicial system.

II. THE DECISION BY THE COURT OF APPEALS THAT A DEFENDANT IS BOUND BY A GUILTY PLEA TENDERED PURSUANT TO A PLEA AGREEMENT REGARDLESS IF THE COURT HAS ACCEPTED THE PLEA INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The decision rendered by the Court of Appeals of Maryland in this case raises an important federal question concering the voluntariness of a tendered guilty plea which has heretofore not been decided by this Court. The major reason advanced by the Court of Appeals for binding Petitioner to his guilty plea, although not accepted by the trial court, was to insure the integrity of the plea bargaining process. However, as pointed out in United States v. Ocanas, supra, until the trial court does accept the plea agreement, neither the State nor the

defendant is justified in relying on the agreement. Petitioner contends that, because his wished to change his tendered guilty plea prior to the trial court's acceptance of the plea and plea agreement, the trial court, in neverthelss holding Petitioner to his plea after he wished to change it, in effect secured from Petitioner an involuntary guilty plea. The question of when a defendant is bound by a guilty plea tendered pursuant to a plea agreement is one which has not yet been decided by this Court, but should be, in order to clarify a defendant's right against self-incrimination.

III. THIS COURT SHOULD REVIEW THE FINDING OF FACT MADE BY THE COURT OF APPEALS THAT THE TRIAL COURT STATED ONLY TO MS. PFAU, AND NOT TO PETITIONER, THAT THEY HAD THE RIGHT TO WITHDRAW THEIR GUILTY PLEAS ANYTIME BEFORE THE TRIAL COURT FINALLY ACCEPTED THE PLEA AGREEMENT SINCE IF, AS PETITONER CONTENDS, THE STATEMENT WAS MADE TO HIM AS WELL, THE REFUSAL BY THE TRIAL COURT TO ALLOW PETITIONER TO WITHDRAW HIS GUILTY PLEA PRIOR TO THE COURT'S ACCEPTANCE OF THE PLEA

AGREEMENT DENIED PETITIONER FUNDAMENTAL FAIRNESS AS EMBODIED WITHIN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioner contends that the statement by the trial court that, "you still have a right to withdraw your plea, if you care to do so, anytime before the court finally accepts it," was intended for both Ms. Pfau and Petitioner. In support of this argument, Petitioner adopts and incorporates herein the dissenting opinon of the Court of Appeals, found in the Appendix, infra, at A. 49. If, as Petitioner contends, the statement was intended for him as well, one can hardly argue that the subsequent refusal of the trial court to allow Petitioner to withdraw his tendered guilty plea prior to the trial court's acceptance of the plea agreement denied Petitioner fundamental fairness as required by the due process clause of the Fourteenth Amendment. Since Petitioner's due process rights turn on a resolution of

factual dispute as to whether the trial court's statement was intended for Ms. Pfau as well as Petitioner, this Court should grant a writ of certiorari in order to review the facts of this case and resolve the dispute. Brookhart v. Janis, 86 S. Ct. 1245 (1966); Feiner v. People of State of N.Y., 71 S. Ct. 303 (1951).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, That on this 29th day of January, 1982, 3 copies of the foregoing Petition for Certiorari was hand-delivered to Alexander Cummings, Assistant Attorney General, One South Calvert Street, Baltimore, Maryland 21201, Attorney for Respondent.

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Appendix

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

September Term, 1980

No. 13

NEAL BLINKEN

v.

STATE OF MARYLAND

Thompson
Lowe
Couch,
JJ.

Opinion by Couch, J.

Filed: October 9, 1980

Th e appellant, Neal Blinken, was charged in a thirty-one count indictment with multiple violations of the Controlled Dangerous Substances law of Maryland.

On November 1, 1979, he appeared before the Circuit Court for Queen Anne's County and entered pleas of guilty to counts 1, 2, 3, and 4 of the indictment. These pleas were provisionally accepted[1] and a pre-sentence investigation was ordered. The appellant appeared for sentencing on January 3, 1980 and moved to withdraw his guilty plea. The motion was denied, and the Circuit Court finally accepted the guilty plea. The appellant was then sentenced to a term of imprisonment of ten years and fined $50,000.00.

By this appeal the appellant

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1. In the Certificate of the Presiding Judge, dated 11-1-79, the judge wrote, "(4) [T]he Defendant's pleas of guilty are tentatively but not finally accepted by the Court provided their [sic] is a factual basis for the pleas and the representations made here today are confirmed by a P.S.I. report as to the defendant.

presents three questions:

> "1. Did the Court abuse its discretion in denying appeallant's request towithdraw his guilty plea prior to sentencing?
>
> 2. Was the appellant fully advised of the nature of the charges against him?
>
> 3. Was the appellant's plea of guilty free and voluntary?"

In view of the particular issues raised in this appeal, only a brief statement of the factual background of the case is necessary. Supplementary facts will be provided with our discussion of the issues.

When the appellant and his co-defendant, Kari Lou Pfau, appeared before the Circuit Court on November 1, 1979, they entered pleas of guilty to charges of (1) possession of marijuana in sufficient quantity to indicate an intent to distribute, (2) possession of marijuana, (3) possession of cocaine, and (4) keeping and maintaining a public

nuisance, that is, a dwelling house used by drug abusers as a location in which to administer controlled dangerous substances. Miss Pfau also pleaded guilty to a fifth count of conspiracy to distribute marijuana.

The court concurrently asked both Pfau and Blinken if they had been furnished with the charging document, if they had read it, and discussed it with their attorney and if they understood every charge. They separately indicated their understanding of their charges. The court recited the five counts against Pfau, and then received Blinken's statement that he understood that the first four counts of his indictment were the same as those indicated in the case against Pfau.

The appellant stated his version of the plea agreement between himself and the State. This agreement included the sentencing of Pfau to an agreed ten year

suspended sentence, five years probation, a $10,000.00 fine, and the State's entering a nolle prosequi on the additional conspiracy charges.[2] Additionally, the appellant indicated his understanding that in return for his pleading guilty to four charges, the remaining charges would not be pursued by the State and that he would be sentenced to ten years imprisonment and a $50,000.00 fine. The appellant was advised of his right to plead not guilty to the charges, to elect to be tried by a judge or a jury of twelve persons, and to require the State to prove its case beyond a reasonable doubt to the judge or to a unanimous jury. The factual basis of the pleas was then presented by a Sergeant of the Maryland State Police. The guilty pleas were tentatively accepted

2. The appellant was informed, however, that the plea agreemnt would not bar his being prosecuted for conspiracy by any other political subdivision of Maryland.

pending the receipt of pre-sentence investigations.

On December 12, 1979, the Circuit Court received a letter from the appellant indicating that he did not wish to pursue his guilty plea, and that he wished to preserve his right to appeal. When he appeared for sentencing on January 3, 1980, the appellant moved through counsel to withdraw the guilty plea. The appellant testified that he originally pleaded guilty because of certain mental and psychological pressure on him. He stated that the only reason for his guilty plea was the consideration given to Miss Pfau in the plea agreement, and that he was in a state of shock when he entered the plea. In that condition he claimed that he would have sold his life in order to spare Miss Pfau any unnecessary pain.

Miss Pfau testified as to her own belief that her plea agreement was linked

with the plea of Blinken. After hearing the State's Attorney express his opposition to the appellant's motion to withdraw the guilty plea, the court overruled the motion, and sentenced the appellant.

I. Withdrawal of the Guilty Plea

Maryland Rule 731 F. 1. states:

> "When justice requires, the court may permit a defendant to withdraw a plea of guilty or nolo contendere and enter a plea of not guilty at any time before sentencing."

On appeal, Blinken contends that the Circuit Court abused its discretion in refusing his request to withdraw his guilty plea. The appellant argues that his plea and that of his co-defendant were not "mutually dependent," and thus the court could have accepted Miss Pfau's plea while not necessarily accepting Blinken's plea. The appellant further maintains that justice required the court to permit the guilty plea to be withdrawn because the State failed to show that it would be prejudiced

by the plea's withdrawal. While acknowledging that there is no well-defined standared for whether a trial judge should accept or deny a motion for withdrawal, the appellant believes that the facts of Fontana v. State, 42 Md. App. 203, 399 A. 2d 950 (1979), cert. denied, ___Md.___(1979), create such a standard.

We disagree with the appellant's contentions, and with his interpretation of the Fontana decision. In Fontana we held that a trial judge had not abused his discretion in denying the withdrawal of a guilty plea. In the facts of that case we found very strong reasons for upholding the presumption that the trial judge properly exercised his discretion. We did not hold in Fontana, and we will not hold in the present case, that the presumption favoring a trial judge's ruling will be rebutted by the absence of prejudice to the State or delays in the case.

The validity of a judge's discretionary ruling may be enhanced by evidence such as that in Fontana, but the absence of such evidence does not invalidate the ruling. Rather, such a rebuttal requires evidence on the record indicating that the State or the court acted to prejudice the appellant, or that the appellant was harmed by the failure of the court to follow guidelines of constitutional magnitude. See Kisamore v. State, 286 Md. 654, 664, 409 A. 2d 719, 725 (1980), in which the Court of Appeals held that justice required that a defendant be permitted to withdraw his guilty plea after the State repudiated part of a plea agreement, and where the plea did not meet the constitutional test for voluntariness.

We hold that the granting of a motion to withdraw a guilty plea lies in the sound discretion of the trial judge, and unless there is a manifest abuse of that discretion,

the denial of the motion will not be disturbed by this Court. Palacorelle v. State, 239 Md. 416, 420, 211 A. 2d 301 (1965); Watson v. State, 17 Md. App. 263, 268, 301 A. 2d 26 (1973).

Our examination of the record uncovers none of the egregious circumstances which have previously warranted an overturning of a judge's discretionay ruling. Instead, we find that the trial judge carefully examined the appellant at the time that the guilty plea was entered, and at the time when its withdrawal was requested. The judge allowed the appellant to explain the request for the withdrawal. During this inquiry, the appellant, responding to questions from the State's Attorney, stated:

> "A The reason I felt it was, I plead guilty or agreed to plead guilty was because, while I believe I stated there was no physical coercion involved I thought there was a great deal of of mental and psychological pressure on me. I just thought that I had a very, in my mind, that I had a valid appeal position and I felt that my rights to

appeal were certainly being extorted from me. I hope that's not too strong a word, but I felt my appeal right was being denied me by using Miss Pfau as a lever against me, so to speak, or a pawn in the game as opposed to her being her ownself, her own person.

Q Well, go back to my original question, what other reasons, if any, exist for your pleading guilty in this case other than the consideration given to Miss Pfau?

A Other than the reasons that I just stated that would be it.

Q That's the only reason you pled guilty on that day?

A Yes. ...

I know it may sound difficult for you all to believe because you're in contact with this type of atmosphere all of the time. I mean it is you job, but my experience in this matter is very limited so, you know, maybe that's why I was a little hesitant to realize exactly what was happening. Just in principle alone, I don't think it is right to use another individual who has their own constitutional right and their own personality, their own life, their own being, I don't think it is right to use that person against another person as a force to take out the State's will on another person.

Q You knew when you were here November 1st if you proceeded to trial before the jury you would have preserved

your appellate rights, didn't you?

A I knew, yes, that I would, but at the time --

Q Why did you enter a plea of guilty in view of that right available on November 1st?

A As I just finished explaining, it was like a state, I was in like a state of shock. I mean I was just being forced emotionally, intellectually, and physically by the repetity of the events taking place. I really didn't have a chance to realize the entire scope of what was happening and delve into my feelings."

The judge himself questioned the appellant concerning the claim that Miss Pfau was "held hostage" to coerce the appellant. The appellant discussed his situation directly with the judge on the record.

Before denying the appellant's request to withdraw the guilty plea, and finally accepting the plea, the trial judge discussed the applicable case law and determined that the appellant's guilty plea was made knowingly, intelligently, and voluntarily.

The examination of the record indicates only sparse and vague allegations concerning the judge's exercise of his discretionary authority. These allegations do not overcome the "presumption of verity" which the judge's ruling possesses. Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621 (1977). Therefore, we conclude that the trial judge did not abuse his discretion in denying the appellant's motion to withdraw his guilty plea.

II. The Charges Against the Appellant

During the proceeding of November 1, 1979, the following colloquy took place between the trial judge and the two co-defedants:

> The Court: Now, have you been furnished with a copy of the charging document, which is an indictment; have you read the same, discussed it with your attorney, and do youfully understand every charge lodged against you?
>
> Miss Pfau: Yes, Your Honor, I do.
>
> Mr. Blinken: I do also, Your Honor.
>
> The Court: Sir?

Mr. Blinken: I do also, Your Honor.

The Court: Miss Pfau, in this case do you understand that you are charged with having in your possession a controlled dangerous substance, to wit; marijuana, in sufficient quantity to reasonably indicate under all circumstances an intent to distribute that controlled dangerous substance, as to the first count.

The second count you are charged with possession of marijuana. These dates are April 28, 1979, in Queen Anne's County.

In the third count that you did possess cocaine, I'm summarizing, I'm not reading it. Fourth count you did keep and maintain a common nuisance, a dwelling house and place in Kent Island which is and has been resorted to by drug abusers for purposes of illegally administering controlled dangerous substances et cetera.

You have seen a copy of it, the counts which you have entered a plea of guilty, that you did unlawfully conspire with Neal Blinken to unlawfully and felonioulsy distribute a certain controlled dangerous substance, to wit; marijuana, on 28th of April, 1978. The rest of the counts are all conspiracy charges to which I understand the State's Attorney will enter a nul-pros. [sic]

Now, Mr. Blinken, do you understand that the first four counts which you have entered a plea of guilty in the indictment are the same as those indicated in the case of Miss Pfau?

Mr. Blinken: I understand, Your Honor.

The Court: And that the remaining counts are conspiracy counts, which I understand if the Court accepts the plea the State's Attorney will nul-pros. [sic]

Mr. Blinken: I understand, your Honor.

The Court: And you understand those, you say?

Mr. Blinken: Yes, Your Honor, I do.

On Appeal, Blinken contends that he was not thoroughly advised of the nature of the charges against him pursuant to Maryland Rule 731 3. c., which states:

> "The court may not accept a plea of guilty without first questioning the defendant on the record to determine that the plea is made voluntarily, with understanding of the nature of the charge and the consequences of the plea. The court may accept the plea of guilty even though the defendant does not admit that he is in fact guilty if the court is satisfied that there is a factual basis for the plea. If the court refuses to accept a plea of guilty, the court shall enter a plea of not guilty."

He indicates that the charges were read to his co-defendant, and that he was not advised of the essential elements of the various offenses.

This Court has held that in order to comply with Md. Rule 731 3. c. a judge must inquire on the record of the defendant whether he understands the charges to which he pled guilty. Priet v. State, 45 Md, App.1, 410 A. 2d 1107 (1980), cert. granted, May 2, 1980.

The record reveals that the judge conducted the requisite inquiry of the appellant before the guilty plea was tentatively accepted. The judge did not merely ask the appellant whether he had discussed the charges with defense counsel, but the judge continued the inquiry on the record to determine that the appellant understood the indictment. Furthermore, the appellant, being sworn, signed the transcript of his answers to the court's inquiry.[3]

3. The record contains the form completed in court during Blinken's interrogation by the judge, signed by the appellant, his counsel, and the Clerk of the Circuit Court.

Thus our examination of the record leads us to conclude that the court complied with Md. Rule 731 3. c.

III. Voluntariness of Appellant's Plea

During the November 1, 1979 proceeding, the court inquired of the appellant and his co-defendant:

> The Court: Now Miss Pfau, has the State's Attorney, or your lawyer, or any law enforcemnt officer or anyone else threatened you or used physical force or violence on you in any way to make you feel afraid, to influence you to plead guilty in this case?
>
> Miss Pfau: No.
>
> The Court: You, sir?
>
> Mr. Blinken: Not physical violence, Your Honor.
>
> The Court: Well, no physical violence. What about any threats upon you?
>
> Mr. Blinken: No, Your Honor.

The Court additionally asked the appellant if anyone had promised him anything to plead guilty or if plea negotiations had caused him to plead guilty. The appellant's response was limited to the facts of the

negotiated plea, and the record does not reveal any sign of duress on the part of the appellant. Rather, the transcript indicates that the appellant felt on November 1, 1979 that his plea was made freely, understandingly, and voluntarily, without compulsion, intimidation, duress, or promise of leniency being made to him by anyone in order to procure his pleas, other than the accommodations set forth in the transcript.

The appellant contends on appeal, however, that his right of due process was denied by the apparent dependence of Miss Pfau's freedom upon the appellant's guilty pleas. The appellant argues that this dependence acted to render his pleas involuntary.

We disagree with this contention and find that the appellant entered voluntary guilty pleas.

The standard for determining the

validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the options available to a defendant. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970). Our Court of Appeals has developed a four-part test for determining when the standard is met. In Hudson v. State, 286 Md. 549, 409 A. 2d 692 (1979), the Court stated:

> "This standard is met when the plea was entered by an accused:
>
> (1) voluntarily, that is, not through coercion, terror, inducements or threats, subtle or blatant; and
>
> (2) with an intelligent understanding, that is, not through ignorance or incomprehension:
>
> (a) of the nature of the offense to which he is pleading guilty; and
>
> (b) of the possible consequences of such a plea; and
>
> (3) unconditionally, that is, without any condition or qualification;
>
> (4) even though the accused denies his guilt, provided the prosecution demonstrates a strong factual basis for the plea and the accused clearly expresses a desire to enter it despite his professed belief in his innocence." Id. at 595.

Applying this test, we find that:

(1) The plea was made voluntarily because the "linkage" between the co-defendants' plea agreements did not constitute even a subtle inducement, but rather formed the accommodation which was the end product of plea negotiations.

(2) The indications of the appellant's intelligent understanding of the plea were elicited by the court's scrutiny.

(3) The appellant's signed statement which accompanied his guilty plea indicates no conditions or qualifications to the plea arrangement.

(4) Concurrent with the presentation of the factual basis of the case, the appellant indicated his desire for the entry of the guilty plea.

See Miller v. State, 32 Md. App. 482, 361 A. 2d 152 (1976).

This application of the four-part test supports our holding that the appellant's guilty plea was properly entered and accepted. We find additional support from decisional law holding that the involvement of third party beneficiaries in plea negotiations is not an intrinsic infirmity to the negotiated plea. Rather than constituting

error, the use of lenient treatment for third parties as a part of a negotiated plea simply requires that "special care must be taken to ascertain the voluntariness of" guilty pleas entered in such circumstances. United States v. Tursi, 576 F. 2d 396, 398 (1st Cir. 1978).

The present case may be distinguished from circumstances in which prosecutors in plea bargaining may have used actual threats against unindicted third persons as a negotiating tactic. United States v. Nuckols, 606 F. 2d 566, 569 (1979). The appellant's situation compares with several cases in which "Sir Galahad" pleas have been negotiated in such a fashion as to protect co-defendants, as well as being advantageous to the negotiator. See Bishop "Federal Habeas Corpus in State Guilty Pleas," 71 F.R.D. 235, 278, for cases cited therein.

In a drug law violation case similar to the present case, Circuit Judge Feinberg rejected a

relator's argument on the claim that a guilty plea was involuntary. In United States ex. rel. Cunningham v. Follette, 397 F. 2d 143 (2d Cir. 1968) he stated:

> The principal bases [sic] for the assertion of involuntariness are that an assistant district attorney had said that if Cunningham wanted to 'take a plea' and that Cunningham was under the influence of narcotics at the time of the guilty plea. We have examined the available record of the prceedings in the state court on May 11, 1964, when Cunningham pleaded guilty, and on June 16, 1964, when he attempted to withdraw his plea. Cunningham admitted that the alleged remark of the prosector was not made to him; he also disclaimed any promise from the court, but pointed to the 'pressure' of the indictment, undeniably present but hardly improper. The transcript shows that the state judge carefully questioned appellant when he took the guilty plea; it also reflects Cunninghams' apparent misapprehension, when he attempted to withdraw his plea, that just because he had handed the paper bag to Miss Davis, he did not have possession of the narcotics. It may be that Cunningham was also influenced by a desire to help Miss Davis. But that would not invalidate the plea in a case in which he was represented by competent counsel, the plea was voluntarily made with no inducemnt by the court or the prosecutor and the state was ready

> to go ahead at the time of the plea, as was the case here." Id. at 146.

For the foregoing reasons we find that the judgments and sentences of the Circuit Court must be affirmed.

JUDGMENTS AFFIRMED

COSTS TO BE PAID BY THE APPELLANT.

IN THE COURT OF APPEALS OF MARYLAND

NO. 120

September Term, 1980

NEAL BLINKEN

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Digges
Eldridge
Cole
Davidson
Rodowsky
JJ.

Opinion by Cole, J.
Digges, Eldridge and
Davidson, JJ., dissent.

Filed: October 5, 1981

In this case we shall determine whether it was error for a trial court to decline to permit a defendant to withdraw from a plea agreement.

We begin by outlining the facts. Appellant, Neal Blinken, was a thirty-five year old college graduate who, the State had charged, was extensively involved in a major marijuana ring with the assistance of his twenty-one year old girlfriend, Kari Lou Pfau. Ms Pfau, who had completed the tenth grade, had lived with appellant for four years and was later to become appellant's wife. Pursuant to a search of what was believed to be the ring's warehouse, approximately one and one half tons of marijuana were seized. As an outgrowth of information obtained by a tap of appellant's brother's telephone, and a search of appellant's house pursuant to a search warrant, approximately four

pounds of marijuana, traces of cocaine, and approximately $629,000 in cash were seized. Appellant and his girlfriend were arrested and appellant was charged in a thirty-one count indictment with multiple violations of the Controlled Dangerous Substances Law of Maryland and twenty-seven related counts of conspiracy. Appellant's girlfriend was similarly indicted.

On the morning of trial, the defendant's counsel, Phillip Sutley, Esquire, advised the trial court that the defendants had elected to change their pleas of not guilty to pleas of guilty, subject to a plea agreement with the State. The trial court then conducted a meticulous examination of the defendants, which we relate in pertinent part as follows:

> THE COURT: I'm going to ask both Miss Pfau and Mr. Blinken to stand, and hopefully you have seen a copy

of the transcript for taking a plea of guilty by the Court, and I will address the question to both of you and ask Miss Pfau to answer first and then Mr. Blinken to answer second.

Now you are to be sworn on this before the Court puts the question to you, so you hold up your right hand and the clerk will administer the oath to you.

***

THE COURT: I have to write down everything you say so if your answer can be concise , yes or no, then that is sufficient.

***

THE COURT: Now , have you been furnished with a copy of the charging document, which is an indictment; have you read the same, discussed it with your attorney, and do you fully understand every charge lodged against you?

MISS PFAU: Yes, Your Honor, I do.

MR. BLINKEN: I do also, Your Honor.

THE COURT: Sir?

MR. BLINKEN: I do also, Your Honor.

THE COURT: Miss Pfau, in this case do you understand that you are charged with having in your possession a controlled dangerous substance, to

wit: marijuana, in sufficient quantity to reasonably indicate under all circumstances an intent to distribute that controlled dangerous substance, as to the first count.

The second count you are charged with possession of marijuana. These dates are April 28, 1978, in Queen Anne's County.

In the third count that you did possess cocaine, I'm summarizing, I'm not reading it. Fourth count you did keep and maintain a common nuisance, a dwelling house and place in Kent Island which is and has been resorted to by drug abuse for purposes of illegally administering controlled dangerous substances et cetera.

You have seen a copy of it, the counts which you have entered a plea of guilty, that you did unlawfully conspire with Neal Blinken to unlawfully and feloniously distribute a certain controlled dangerous substance, to wit: marijuana, on 28th of April, 1978. The rest of the counts are all conspiracy charges to which I understand the State's Attorney will enter a nolpros.

Now, Mr. Blinken, do you understand that the first four counts which you have entered a plea of guilty in the indictment are the same as those indicated in the case of Miss Pfau?

MR. BLINKEN: I understand, Your Honor.

THE COURT: And that the remaining counts are conspiracy counts, which I understand if the Court accepts the plea the State's Attorney will nol-pros.

MR. BLINKEN: I understand, Your Honor.

THE COURT: And you understand those, you say?

MR. BLINKEN: Yes, Your Honor, I do.

***

THE COURT: (Speaking to Miss Pfau):

Now I am going to read this carefully and see if this is going to be your answer.

I ask you to give a detailed explanation of the promises and plea agreement made and who made them. The answer is you agreed upon a ten years sentence with a suspension; five years probation; $10,000 fine, payable in four and a half years in installments, to be determined by the Division of Parole and Probation. That is the amount of the installments.

The State will proceed promptly with the forfeiture of the automobile and currency seized as a result of the search and seizure warrant issued by this Court. Defendant waives the provision of Maryland Rule 746, which I explained, will explain to you to mean that you

are supposed to have your trial within 120 days from the time that you first appeared in court. That 120 days under recent decision of the Court of Appeals of Maryland began on July 25, 1979 as to all cases then pending, which roughly means you should be tried. If you are tried at all, by November 25.

MR. BRADEN: 22 , I think.

THE COURT: Figure 120 days. Do you understand that? Now the reason that they are requiring the waiver is that if the Court does not finally accept your plea agreement and then permits you to withdraw your plea of guilty here today and you actually go to trial, that could very well fall beyond the 120 days. So do you understand that?

MISS PFAU: Yes, I do.

THE COURT: If the Court accepts the plea agreement, the State's Attorney will nol-pros the remaining counts. A PSI report, meaning a presentence investigation report, will be ordered, and defendant continued on bail until sentencing. Is that your understanding of the plea agreement as explained to you by your attorney?

MISS PFAU: Yes.

The Court then proceeded to examine the defendant Blinken:

THE COURT: The question is, has

anyone promised you anything to induce you to plead guilty or have you either directly or thru your lawyer engaged in plea negotiations which would cause you to plead guilty in this case?

MR. BLINKEN: Yes, Your Honor.

After detailed examination, the court summarized the questions and answers as follows:

THE COURT: All right. Mr. Blinken, see if you accept this language as being correct? I asked you to give a detailed explanation of the promises made and who made them, and the answer is, the State's Attorney's agreement was that Kari Lou Pfau would receive the plea agreement stated by her, and I would receive a sentence of ten years and $50,000 fine, to be secured by the signing over of $50,000 of the proceeds of the sale of a farm on Kent Island, plus a mortgage on the farm for security payment of the fine on or before December 31, 1979. A PSI report and bail continued until sentencing. Will plead guilty to count 1 thru 4. Counts 5 thru 31 will be nol-prossed upon acceptance of the plea by the Court. It is understood that the nol-prossed counts, which are conspiracy counts, will not bar a trial on conspiracy charges of this defendant in any other political subdivision of this State.

Defendant waives the provision of Maryland Rule 746, which is the rule that you should be tried within 120 days from July 25, 1979. The State will promptly proceed with forfeiture of the automobiles and currency received as a result of the search and seizure warrant issued by this Court.

MR. BLINKEN: That is my understanding.

The Court then proceeded to advise the defendants that he had the right to plead not guilty, to be tried by a jury and to require the State to produce proof of his guilt beyond a reasonable doubt, to be confronted by the witnesses against him, whom he could cross-examine, and the right to testify or not testify and if he chose not to testify the jury could not consider this fact as any admission of guilt. The court further explained that by pleading guilty each gave up certain rights to appeal, such as to contest the validity of the search warrant.

The court then engaged the couple

in the following colloquy:

> THE COURT: Do you understand that if you plead guilty the sentence will be according to the plea agreement, and if not finally accepted you may withdraw your plea?
>
> MISS PFAU: Yes, I understnad.
>
> THE COURT: And you, sir?
>
> MR. BLINKEN: I also understnad, Your Honor.

The court then asked the defendants to read the answers to the questions he had recorded and if correct to sign them. After being sworn the defendants signed the transcripts, whereupon the court made the following findings:

> THE COURT: And in the case of Mr. Blinken the Court finds that Mr. Blinken, being represented by his privately employed counsel, Phillip Sutley, pleads guilty to counts 1 thru 4 of the indictment charging him with violation of the CDS law.
>
> The undersigned is fully satisfied and finds from an examination of the defendant Blinken as set forth in said transcript that he has been fully apprised of all of his constitutional rights and that his pleas of guilty are freely, understandingly and voluntarily made without

> any due influence, compulsion, intimidation, force, duress or promise of leniency being made to him by anyone in order to procure, induce his pleas of guilty other than inducements as may be set forth in the transcript, namely the plea agreement.
>
> That the defendant's pleas of guilty are tentatively but not finally accepted by the Court provided there is in fact a basis for the pleas and the representations made here today are confirmed by a PSI report as to the defendant.

The court called upon the State to present the factual basis for the pleas, which was done, and after which the court found the pleas to be properly supported. Next, the court called upon defense counsel to proffer justification for the court's acceptance of the plea agreement. Defense counsel proffered that neither defendant had a record of criminal conviction. He discussed Ms pfau's medical history and continuing condition, and the fact that the two defendants were planning to marry. The Court then reviewed the agreement and the

justification, noting particularly the search and seizure problems which had contributed to the State's desire to obtain the defendants' pleas. The trial judge next reviewed the conditions incident to Ms Pfau's agreement specifically. The transcript of the hearing at this point reflects:

> I want Miss Pfau to make sure she hears everhthing I am saying. You still have a right to withdraw your peea, if you care to do so , anytime before the Court finally accepts it.
>
> That the probation required by the Court will be what we call intensive probation, which means that she will be continually under the jurisdiction of the Division of Correction, and more specifically will be seeing the probation agent frequently, either by visits to where she works or is living or will be required to report periodically to the office of the probation agent.
>
> That, of course, if she violated those conditions then she has a possible ten years sentence to serve.
>
> Do you fully understand that, Miss Pfau?

MISS PFAU: Yes.

THE COURT: So, as I have indicated, the Court is accepting these tentatively, but not finally provided the representations made here today are confirmed by a PSI report as to each defendant. [Emphasis supplied].

Prior to the final disposition date, Appellant addressed a letter to the court indicating that he wished to withdraw his plea, in order that he might preserve his appellate rights, particularly in light of the issues which had been raised with respect to the search of his house.[1] But primarily because he protested the fairness of the State's procurance of his plea in exchange for the favorable agreement which had been given Ms Pfau. At the January 3, 1980, disposition he again asserted these reasons and

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[1] At appellant's hearing on his guilty plea, the trial judge noted that the wiretap had been "found illegal by the judge in Baltimore County." The court also noted that there was "and probably would continue to be a strong challenge to the search warrant which was issued in this case."

asked the court's permission to withdraw his plea. Ms Pfau testified, as his witness, that she wished to continue with her plea. The court denied appellant's request to withdraw, finding that his initial decision had been made intelligently and voluntarily and with the benefit of counsel. The court concluded that appellant was merely engaged in "gamesmanship" with the court, as at that point, the State was already locked into its agreement with Ms Pfau. Upon finding that the PSI report bore out the representations which had earlier been made, the Court concluded that "justice" did not require the Court to permit appellant to withdraw his plea. After granting the defendant his right of allocution, the court proceeded to sentence him according to the plea agreement, and to inform him of his appellate rights. Thereafter, the proceedings were concluded.

On appeal appellant questioned, inter alia, the trial court's exercise of discretion in denying his request to withdraw on the grounds which had been asserted. The Court of Special Appeals affirmed the conviction, Blinken v. State , 46 Md. App. 579, 420 A. 2d 997 (1980), holding that the allegations made concerning the judge's exercise of discretion were insufficient to overcome the "presumption of verity" which the trial court's ruling possesses and, therefore, there had been no abuse of discretion in denying Blinken's motion to withdraw his plea. 46 Md. App. at 585.

We granted certiorari to determine if the trial court abused its discretion by refusing to allow appellant Blinken to withdraw his guilty plea when the plea agreement had not been "finally accepted".

The disposition of this case,

ultimately, depends on our interpretation of Maryland Rule 733, entitled "Plea Agreements". Section (a) of Rule 733 provides that "the defendant or his counsel may enter into an agreement with the State's Attorney to plead guilty or nolo contendere on any proper condition." Subsection (a)(6) provides that the parties will submit the agreement to the judge for consideration pursuant to section (c). Subsection (c)(1) provides that if a plea agreement has been reached pursuant to subsection (a)(6), then:

> defense counsel and the State's Attorney shall advise the judge of the terms of the agreement when the defendant tenders the plea. The judge may accept or reject the agreement or may defer his decision as to acceptance or rejection until after the pre-sentence proceedings and investigation he deems necessary.

Subsection (c) (3) provides:

> If the judge accepts the plea agreement, he shall accept the defendant's plea in open court and embody in his judgment the

> agreed sentence, disposition or other judicial action encompassed in the agreement, or, with the consent of the parties, a disposition more favorable to the defendant than that provided for in the agreement.

Subsection (c) (4) continues:

> If the judge rejects the plea agreement, he shall inform the parties of this fact and shall advise the defendant that the court is not bound by the plea agreement, that the defendant may withdraw his plea,...

The last section of Rule 733, Section (d) , requires:

> All proceedings pursuant to this Rule, including tender of the plea, advice by the court inquiry into the voluntariness of the plea or plea agreements, and inquiry into the factual basis for the plea shall be on the record.

The thrust of Blinken's argument is that the court does not accept the guilty plea until it accepts the plea agremeent and thus he maintains he has the unbridled right to withdraw the plea anytime before final disposition. But to adopt his argument is to have the cart pull the horse.

Fundamental to any plea agreement is a voluntary, factually supported guilty plea. A court may not enforce a plea agreement when the plea is involuntary or unsupported factually. We do not construe Rule 733 (c)(3) to mean that the tender of a voluntary guilty plea and imposition of the agreed sentence must occur at one and the same time.

When a plea agreement is presented to the court, the judge must determine the adequacy of the proceeding in two ways: one, whether the defendant understands and voluntarily tenders his guilty plea which is supported factually, and two, whether the agreement is one which punishes the defendant for his act as well as satisfies the public interest that justice not be thwarted. To make certain that step two is pursued properly, the Rule allows the judge to defer disposition until he has checked the information supplied by the

defendant, his counsel and the State's Attorney. In other words, the court is given the opportunity to make an independent assessment of the agreement.

The appellant, nevertheless, argues that in the instant case, when the trial judge said he was "tentatively accepting the plea",that this implied that Blinken still had the right to withdraw anytime before final acceptance of the agreement. We disagree. When the court said it was tentatively accepting the defendant's guilty plea, it was acknowledging that something remained to be done - approval or rejection of the plea agreement. There was no question that the plea was voluntarily tendered to the court. The trial court had followed a meticulous and exemplary procedure in determining that the guilty pleas were voluntary. It had recorded the answers to the questions put to each of the defendants, read those answers back to the

defendants, required the defendants to acknowledge their answers by signing the transcript thereof and then had the defendants' counsel countersign the transcript as a witness. The court then found as a fact that the pleas were voluntary and after the State's Attorney produced evidence of the crimes and the defendants' involvement therein, the court concluded that the factual basis for the pleas was adequate. It was at this point that the court determined that it could tentatively accept the pleas, subject to its receipt and review of presentence reports which would verify the defendants' history and their fitness for the proposed dispositions. However, if we had any doubt about the right of a defendant to withdraw a tendered plea as part of plea bargain after such plea has been judged voluntery, it is removed when we examine Rule 733 (c) (4). That part of

the Rule clearly indicates to us that the defendant may not withdraw his tendered plea unless the court rejects the agreement. A contrary meaning would render the language of this subsection superfluous.

We hold, therefore, that once a plea of guilty has been tendered as part of a plea agreement and the court, after examination of the defendant on the record in open court, has determined that the plea is the result of the free, voluntary and intelligent act of the defendant and is factually supported by the evidence proffered as proof that the defendant commiteed the crime charged, the defendant may withdraw his plea only if the court permits him to do so or if the court ultimately rejects the plea agreement, in which case the defendant would have the absolute right to withdraw under Rule 733 (c) (4).

We believe it is in the interests of fair play that a defendant not be permitted, unilaterally, to withdraw the plea which he has tendered pursuant to an agreement reached with the State. Under such circumstances the State would have a duty to uphold the terms of the agreement it had made. See Kisamore v. State, 286 Md. 654,409 A.2d 719 (1980); State v. Brockman, 277 Md. 687, 357 A.2d 376,362 (1976); Miller v. State, 272 Md. 249, 322 A.2d 527 (1974). The defendant should be required to have no lesser duty.

Moreover, we believe that permitting a defendant arbitrarily to withdraw his guilty plea, without permission of the court, would attenuate the usefulness of the plea bargaining process and would render ineffective the long-established practice of permitting defendants to enter guilty pleas while the trial court investigages the basis for the proposed disposition.

Such a holding would emasculate the presentation process as described under Rule 733 (c) (1), as it would render meaningless that part of the subsection which provides that the judge may defer his acceptance of the plea agreement. Thus , we find no abuse of discretion in the court's refusal to permit appellant to withdraw his guilty plea.

Appellant asserts for the first time before this Court that the trial court did not act in the interests of justice when it declin ed to permit him to withdraw his plea after telling him, "You still have a right to withdraw your plea, if you care to do so, anytime before the court finally accepts it." Upon a review of the record, however, it is apparent that at this point in the proceedings the court was addressing Ms Pfau, and not appellant. The court had just engaged in a discussion with defense counsel

regarding Ms Pfau's medical condition, including her past surgery and her asserted need for medical treatment in the future. The court had expressed a desire to review her records and discuss the nature and extent of Ms Pfau's future medical needs. In light of the impact which medical problems may have upon a defendant's desire to plead guilty, it is understandable why the court, in the exercise of its discretion, might have extended permission to withdraw to Ms Pfau while not doing so in the case of appellant. Appellant did not have such problems. Moreover, he was a much older, obviously more mature and a better educated individual, and, as the record discloses, he played a clearly dominant role in the couple's relationship. We find no merit in his contention.

We, therefore, uphold appellant's conviction by affirming the judgment of

the Court of Special Appeals.

JUDGMENT AFFIRMED,
APPELLANT TO PAY THE COSTS.

IN THE COURT OF APPEALS OF MARYLAND

No. 120

September Term, 1980

NEAL BLINKEN

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Digges
Eldridge
Cole
Davidson
Rodowsky,
JJ.

Dissenting Opinion by Davidson, J.,
in which Digges and Eldridge, JJ.,concur.

Filed: October 5, 1981

-A 49

Davidson, J., dissenting:

The majority here states that the "[a]ppellant asserts...that the trial court did not act in the interests of justice when it declined to permit him to withdraw his plea after telling him,'You still have a right to withdraw your plea, if you care to do so, anytime before the court finally accepts it.'"[1] It then finds no merit in this contention.

---

[1] As stated in the appellant's brief, this contention is as follows:

> "The trial court, which had tentatively, but not finally, accepted Appellant's tendered guilty plea pending outcome of a pre-sentence investigation report, abused its discretion by prohibiting Appellant from withdrawing the tendered plea prior to the trial court's final acceptance after telling Appellant he would be allowed to withdraw the plea anytime before the trial court finally accepted it."

Based on the record, it is my view, as will be set forth in this dissenting opinion, that the appellant relies on statements of the trial court, other than that quoted

The majority initially infers that the trial court's statement was addressed solely to Pfau and not to Blinken, an inference that is not necessarily supported by the record and which, even if supported by the record, would be irrelevant .

The majority then asserts:

> "The [trial] court had expressed a desire to review [Pfau's] records and discuss the nature and extent of Ms Pfau's future medical needs. In light of the impact which medical problems may have upon a defendant's desire to plead guilty, it is understandable why the court, in the exercise of its discretion, might have extended permission to withdraw to Ms Pfau while not doing so in the case of appellant."

In so doing, the majority infers that the trial court's purpose in reviewing Pfau's medical history was to determine whether her tendered guilty plea was knowing

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by the majority, to show that the trial court told him he would be allowed to withdraw his tendered plea until it was finally accepted.

and voluntary , and, based upon this inference, further infers that the trial court intended to differentiate between Pfau and Blinken with respect to their right to withdraw their tendered guilty pleas. In my view, the record does not support these inferences. Accordingly, I respectfully dissent.

The record here shows that on 1 November 1979, two cases, one involving Kari Lou Pfau and the other involving Neal Blinken, were simultaneously called for trial. Pfau and Blinken were both then present in the courtroom. At that time, counsel for both indicated that Pfau and Blinken desired to withdraw their previously tendered not guilty pleas. Pfau then tendered guilty pleas to the first five counts of the indictment against her, and Blinken tendered guilty pleas to the first four counts of the indictment against him. The trial court

asked both Pfau and Blinken to stand and then described the procedure to be followed in determining whether to accept their tendered pleas. The trial court said:

> "...I will address the question to both of you and ask Miss Pfau to answer first and then Mr. Blinken to answer second."

Both Pfau and Blinken were then sworn.

In accordance with the outlined procedure, the trial court questioned Pfau and Blinken about the terms of each of their tendered plea agreements and the waiver of rights required before acceptance of a tendered guilty plea. Thereafter, the following colloquy took place:

> "THE COURT: Miss Pfau...[d]o you understand that if you plead guilty the sentence will be according to the plea agreement, and if not finally accepted you may withdraw your plea?
>
> MISS PFAU: Yes, I understand.
>
> THE COURT: And you, sir?
>
> MR. BLINKEN: I also understand, Your Honor." (Emphasis added.)

After finding that Pfau had tendered her plea voluntarily and knowingly, the trial court said:

> "That the defendants [sic] pleas are accepted tentatively but not finally by the Court, provided there is a factual basis for the pleas and the representation made here today concerning the defendant are confirmed by a PSI [Presentence Investigation] report." (Emphasis added.)

Immediately thereafter, the trial court found that Blinken had tendered his plea voluntarily and knowingly and said:

> "That the defendant's pleas of guilty are tentatively but not finally accepted by the Court provided there is a factual basis for the pleas and the representation made here today concerning the defendant are confirmed by a PSI [Presentence Investigation] report." (Emphasis added.)

Immediately thereafter, the trial court found that Blinken had tendered his plea voluntarily and knowingly and said:

> "That the defendant's pleas of guilty are tentatively but not finally accepted by the Court provided there is in fact a basis for the pleas and the representations made

here today are confirmed by a PSI report as to the defendant." (Emphasis added.)

A single statement of facts was presented to establish the factual basis underlying both tendered pleas, and the trial court found that basis to be adequate with respect to both Pfau and Blinken. In response to a query from the trial court, defense counsel offered representations concerning the personal history and criminal records of both defendants, including Pfau's medical history, to justify acceptance of both tendered plea agreements. More specifically, the following colloquy then took place:

> "THE COURT: ...Now, Mr. Sutley, I want you to proffer at this time the representation to justify the Court in accepting this plea agreement.
>
> MR. SUTLEY [Defense Counsel]:... Neither defendant has a record of criminal conviction in this state or any other state. Miss Pfau, throughout the last year, has suffered from various physical ailments necessitating her hospitalization on

several occasions for operations throughout the past year. Nothing terminal. She has been under medical care for a considerable period of time and she is twenty-one years of age, with no record of conviction for either defendant.

THE COURT: And I want.. a very complete report on her health and operations.

Now as I understand it Mr. Blinken has no previous adult criminal record?

MR. SUTLEY: That is correct, Your Honor.

THE COURT: And he is thirty-five and she is twenty-one. How long have they been living together?

MR. SUTLEY: Five years.

MISS PFAU: Four years.

MR. SUTLEY: They are presently engaged, Your Honor, to be married.

THE COURT: Anything else?

MR. SUTLEY: No, Your Honor."

Subsequently, the trial court summarized the terms of Blinken's tendered plea agreement and then the terms of Pfau's tendered plea agreement. Thereafter , the trial court said:

"I want Miss Pfau to make sure she hears everything I am saying. You still have a right to withdraw your plea, if you care to do so, anytime before the Court finally accepts it.

***

Do you fully understand that, Miss Pfau?

MISS PFAU: Yes.

THE COURT: So, as I have indicated, the Court is accepting these tentatively, but not finally, provided the representations made here today are confirmed by a PSI report as to each defendant." (Emphasis added.)

In discharging the jury, the trial court explained the terms of Blinken's and Pfau's tendered plea agreements and then said:

"The Court accepted this on representation, tentatively accepted this, on representations that neither of the parties have had any previous criminal record.

* * *

So this is why we don't need your services any further today, because the Court has taken these plea agreements and guilty pleas, tentatively, subject to confirmation by investigation by the Division of Parole and Probation, which we call a presentence investigation report, which is usually very thoroughly

> done, in which their background is checked out, in which their criminal record, if any, is thoroughly checked, and today we have very sophisticated criminal information systems where convictions are recorded both by the FBI and our own Maryland Criminal Information System.
>
> So it is taken tentatively subject to the fact that the representations made to the Court today as to their background, the medical history of Miss Pfau are confirmed by that report..." (Emphasis added.)

In my view, the record establishes that the trial court's statement , "You still have a right to withdraw your plea, if you care to do so, anytime before the court finally accepts it," was addressed to Blinken as well as to Pfau. Moreover, even if the statement was addressed solely to Pfau, I would conclude, based on the record, that Blinken had the right to withdraw his tendered plea.

The procedures utilized in this proceeding indicate that the trial court did not intend to differentiate between

Pfau and Blinken with respect to their right to withdraw their tendered pleas. Blinken and Pfau were defendants in a consolidated proceeding. They were both represented by the same counsel and were both present when their guilty pleas were tendered. The trial court recognized that the terms of the individual plea agreements were integrally interrelated because Pfau's probation was an inducement to and a condition of Blinken's plea agreement. The procedure established by the trial court was to address a single question to both Blinken and Pfau and to have Pfau answer first and Blinken answer second. This procedure was followed when the trial court questioned Pfau and Blinken with respect to the terms of their tendered plea agreements and the waiver of rights required for acceptance of a guilty plea. A single statement of facts was presented

to establish the factual basis underlying both tendered pleas and the trial court found that basis to be adequate with respect to both. Representations justifying the trial court in accepting each of the tendered plea agreements were presented by counsel in a single statement.

More important, the trial court initially told both Blinken and Pfau that "if not finally accepted you may withdraw your plea." Thus, it expressly stated that Blinken as well as Pfau had the right to withdraw their tendered pleas until finally accepted. The trial court then told them individually that their tendered pleas were "accepted tentatively but not finally by the Court." Thus, the trial court made it clear that the consequence of the tentative acceptance of their tendered pleas was that both had the right to withdraw them until finally accepted. After

emphasizing that it wanted Pfau to hear what it was saying, the trial court reiterated that:

> "You still have a right to withdraw your plea, if you care to do so, anytime before the Court finally accepts it."

When viewed in the context of this proceeding, the trial court's concern that Pfau hear what it was saying does not necessarily support an inference that the statement was addressed solely to Pfau.

Moreover, the trial court's statement, even if addressed solely to Pfau, was completely consistent with its previous statements, clearly addressed to both, that established that Blinken as well as Pfau had the right to withdraw their tendered pleas. In addition, when the trial court made the statement, it did not express an intent to differentiate between Pfau and Blinken with respect to their right to withdraw their tendered pleas. Under

these circumstances, even if it is assumed that the trial court's statement was addressed solely to Pfau, it must be regarded as nothing more than a reiteration, with respect to Pfau, of the trial court's previous statement, clearly addressed to both, that their tendered pleas could be withdrawn until finally accepted. It cannot be regarded as having any impact whatsoever on Blinken's previously established right to withdraw his tendered plea.

Immediately after making the statement, the trial court, clearly addressing both Pfau and Blinken, repeated that it was "accepting these [pleas] tentatively, but not finally." Thus, the trial court, having previously made it clear that the consequence of the tentative acceptance of their tendered pleas was that both had the right to withdraw them, reinforced the fact that both their tendered pleas

could be withdrawn.

In my view, the trial court expressly indicated that Blinken as well as Pfau had the right to withdraw their tendered pleas. Under the circumstances here, the majority's assertion that the trial court's statement was addressed solely to Pfau and not to Blinken is irrelevant.

Finally, on two occasions, the trial court expressly told both defendants that it was accepting their tendered plea agreements and guilty pleas tentatively, but not finally, provided their representations concerning their personal histories were confirmed by a PSI report. In discharging the jury, the trial court expressly said that both plea agreements and guilty pleas were

> "taken tentatively subject to the fact that the representations made to the Court today as to their background, the medical history of Miss Pfau are confirmed by that report..." (Emphasis added.)

In addition, the trial court expressly found that both Pfau's and Blinken's guilty pleas were knowing and voluntary.

Under these circumstances, the trial court's sole purpose in seeking a presentence report, including Pfau's medical history, was to confirm the representations which had been made concerning Pfau's and Blinken's criminal records and Pfau's medical history in order to determine whether to accept the tendered plea agreements which, in the case of Pfau, provided for probation rather than imprisonment, partly because she was allegedly ill. Indeed, having previously found Pfau's tendered plea to be knowing and voluntary, the trial court's purpose could not have been to determine the impact which her "medical problems [might] have upon [her] desire to plead guilty." Accordingly, the majority's inference that the trial court wanted Pfau's medical records to determine her

desire to plead guilty is unsupported by the record.

In sum, in my view, there is nothing in the record to indicate that the trial court intended to differentiate between Pfau and Blinken with respect to their right to withdraw their tendered pleas. There was nothing in the procedures utilized by the trial court to indicate an intent to differentiate between them. There was no difference in the purpose for which the trial court sought the presentence investigation report, including Pfau's medical history. Most important, the trial court expressly stated to both Pfau and Blinken that they could both withdraw their tendered pleas until finally accepted. In the absence of any inconsistent statement or indication to the contrary, I can only conclude that this record establishes that the trial court made an express commitment to Blinken that he had the right to

withdraw his tendered plea until it was accepted.

The record here establishes that Blinken asked to withdraw his tendered plea before it was finally accepted. The trial court denied Blinken's request. In so doing, the trial court failed to honor its express commitment to Blinken. This constituted an abuse of discretion. In my view, fundamental fairness requires reversal.

Judges Digges and Eldridge authorize me to say that they concur in the views herein expressed.

November 4, 1981

Harold Buchman, Esquire
Attorney at Law
5 Light Street, Suite 950
Baltimore, Maryland 21202

Re: Neal Blinken v. State of Maryland
No. 120 - September Term, 1980

Dear Mr. Buchman:

This is to advise you that your motion for reconsideration filed in the above entitled case denied by the Court on November 3, 1981.

Very truly yours,

JAMES H. NORRIS, JR.

Clerk

JHNjr/mjm
Encl.
cc: Alexander L. Cummings, Esq.

STATE OF MARYLAND
vs.
NEAL BLINKEN

IN THE CIRCUIT COURT FOR
QUEEN ANNE'S COUNTY
CRIMINAL TRIALS NO. 2057

CERTIFICATE OF PRESIDING JUDGE

The undersigned Presiding Judge hereby certifies:

(1) That the above named Defendant was sworn in open Court, the questions contained in the attached Transcript were asked him by the undersigned and answers given thereto by said Defendant are as set forth in said Transcript.

(2) That the Defendant, Neal Blinken, being represented by his (privately employed) counsel, Phillip Sutley, pleaded guilty/~~not guilty~~ to Counts Numbers 1 thru 4 of the Bill of Indictment (~~Information~~) charging him with:

violation of the cds laws

(3) That the undersigned is fully satisfied and finds from the examination of the Defendant as set forth in said Transcript that he has been fully apprised of all of his constitutional rights and that his pleas of guilty are freely, understandingly and voluntarily made without any undue influence, compulsion, force, duress or promise of leniency being

made to him by anyone in order to procure or induce his plea of guilty other than such inducements as may be set forth in the Transcript.

(4) That the Defendant's pleas of guilty are accepted by the Court and ~~ordered to be entered on the minutes and in the appropriate records of this Court and Transcript, Certificate of Counsel and Certificate of Presiding Judge are ordered to be filed in his case file jacket.~~ tentatively but not finally /s/ provided there is a factual basis for the plea and the representations made here today are confirmed by a P.S.I. report as to the Defendant. /s/

Date: 11-1-79

Clayton C. Carter /s/
PRESIDING JUDGE

Opposition

Supreme Court, U.S.
FILED
APR 15 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1439

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NEAL BLINKEN,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN H. SACHS,
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QUESTIONS PRESENTED

1. Does a State appellate court's interpretation of a State rule of procedure relating to the discretion of a trial court to permit a defendant to withdraw a tentatively accepted guilty plea generate an issue of constitutional dimension?

2. Does a factual question concerning whether a trial judge advises a defendant that he may withdraw his tentatively accepted guilty plea prior to final acceptance rise to a level of constitutional dimension justifying the exercise of this Court's jurisdiction?

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No. 81-1439

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NEAL BLINKEN,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On November 1, 1979, the Petitioner appeared in the Circuit Court for Queen Anne's County Maryland and tendered guilty pleas to four counts of an indictment charging multiple violations of the controlled dangerous substances law of Maryland. On that same date the pleas were tentatively accepted subject to a presentence investigation report confirming certain statements made by Petitioner. On January 3, 1980, Petitioner appeared for sentencing and after a motion to withdraw his guilty pleas was denied, Petitioner was sentenced to ten years in prison and fined $50,000. On October 9, 1980, the Court of Special Appeals filed a

reported opinion affirming the judgment and sentence of the circuit court. See Blinken v. State, 46 Md. App. 579, 420 A.2d 997 (1980) (Pet. App. 1-23). After the Court of Appeals of Maryland granted a petition for a writ of certiorari, that court, on October 5, 1981, filed a reported opinion affirming the decision of the Court of Special Appeals. See Blinken v. State, 291 Md. 297, 435 A.2d 86 (1981). (Pet. App. 24-66). From that decision, the Petitioner has applied to this Honorable Court for a Writ of Certiorari to review the decision of the Maryland Court of Appeals.

JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Honorable Court pursuant to the provisions of 28 U.S.C. §1257(3).

STATE RULES

Annotated Code of Maryland, Rules 731 and 733, Maryland Rules of Procedure. (reproduced in Respondent's Appendix at Apx. 33-37).

CONSTITUTIONAL PROVISIONS

Petitioner contends that the Fifth and Fourteenth Amendments to the United States Constitution are involved. (These provisions are reproduced in the Petition at 6-7).

STATEMENT OF THE CASE

Respondent adopts and incorporates by reference herein the facts set forth by the Court of Appeals in its opinion (Pet. App. 25-37). The Respondent will supplement these facts where necessary in its discussion of the Reasons for Denying the Writ.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT RAISE A FEDERAL CONSTITUTIONAL QUESTION.

The Petition in this case represents the fourth time Petitioner has attacked the validity of his guilty pleas. He did it at the trial level in a post-trial motion to withdraw his guilty pleas; again, he challenged the pleas in the Court of Special Appeals; and finally in the Court of Appeals he sought to overturn the pleas. Yet, at no time in any of these prior proceedings did Petitioner couch the present issues in terms of a violation of a federal constitutional right. (Petitioner's briefs in the Maryland Court of Special Appeals and Court of Appeals are reproduced in Respondent's Appendix at 1-32). Petitioner even concedes in his Petition that ". . . neither of the issues considered by the Court of Appeals [of Maryland] were explicitly couched in terms of federal questions of law. . ." (Pet. 12-13).

Furthermore, the Court of Appeals made it quite clear that their decision did not rest on federal constitutional grounds when it said, "the disposition of this case ultimately, depends on our interpretation of Maryland Rule 733 entitled 'plea agreements'" (Pet. App. 38-39). The Court of Appeals never mentioned Supreme Court or federal decisions in its opinion or otherwise intimated that its decision was based upon either federal or state constitutional provisions. The Petitioner presented to that court a pure question of rule

interpretation. The Court of Appeals decided that question and nothing more. Therefore, in the absence of a federal constitutional question, the Petition should be denied. Rule 17, Rules of the Supreme Court of the United States.

II.

THE PETITION SHOULD BE DENIED BECAUSE THE ISSUES NOW PRESENTED WERE NEVER RAISED AT THE TRIAL LEVEL OR IN THE INTERMEDIATE COURT OF SPECIAL APPEALS.

Although the two questions presented to this Court were raised by the Petitioner and decided by the Court of Appeals of Maryland, those issues were never broached in the trial court or in the Court of Special Appeals. In an effort to overturn the guilty pleas, Petitioner argued in the latter courts that he was entitled to withdraw his pleas because: (1) he wished to preserve his appeal rights; (2) he was psychologically coerced into entering the pleas; and (3) a withdrawal would not have inordinately prejudiced the State or inconvenienced the court. When these arguments failed, Petitioner redirected his attack both in the Court of Appeals and this Court and claimed that he should have been permitted to withdraw the pleas because they had not been finally accepted by the trial court when he moved to withdraw them. It was fortunate for Petitioner that, under these circumstances, the Court of Appeals agreed to exercise its certiorari jurisdiction to review the case. Respondent urges that the Petition should not be granted where Petitioner did not raise the present issues until he reached a

third level of State review. See Ernst and Ernst v. Hochfelder, 425 U.S. 185, 194, n.13, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976).

III.

THE PETITION SHOULD BE DENIED BECAUSE THE FACTS OF THIS CASE ARE PECULIAR AND NOT LIKELY TO RECUR.

Petitioner argues that the issues are of "fundamental importance to the criminal justice system" (Pet. 16). Yet at the same time he acknowledges that his primary issue "rarely has come before the courts since, in almost all cases dealing with the withdrawal of a guilty plea, the plea has already been accepted by the trial court". (Pet. 14). As to this second statement, Respondent wholeheartedly concurs. In its prior research before the State courts, Respondent did not discover any cases in the country where a situation arose like the present one. For that reason, Respondent acknowledged in its brief in the Court of Appeals in Maryland:

> "The fact that there are no decisions on the issue is probably due to the fact that it is unlikely that a defendant would seek to withdraw from a favorable plea agreement which is eventually accepted by the court. See cases collected in 66 A.L.R. 3d 902 in which defendants are generally entitled to withdraw guilty pleas under circumstances where the sentence concessions are not granted and where the defendants are led to believe by either the court, defense counsel or the prosecutor that the court would be bound by the concessions. (Respondent's Brief in the Court of Appeals of Maryland at p. 12-13, n.4).

Although these issues may be "fundamentally important" to Petitioner that fact does not constitute, under Rule 17, a "special and important reason" justifying an exercise of discretion by the Court to review this case. See Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

IV.

THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE DECISION IN THIS CASE AND DECISIONS OF EITHER FEDERAL OR STATE COURTS.

The Petitioner contends that the decision in this case conflicts with decisions of federal and state courts. This contention is wholly without merit. No extended discussion is necessary with respect to the two state court decisions cited by Petitioner because even he concedes that those courts were ". . . not faced with the issue presently before this court". (Pet. 15). United States v. Ocanas, 628 F.2d 353, 357-58 (5th Cir. 1980)[1] cited by Petitioner is distinguishable on its facts and law. In the present case, the trial judge tentatively accepted Petitioner's completely voluntary guilty pleas. He made it clear that he would finally accept those pleas if representations made by Petitioner at the guilty plea hearing were borne out by a presentence investigation report. At a

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[1] Petitioner incorrectly cites this case as 628 F.2d 320.

subsequent hearing, after the trial judge had an opportunity to review the report and satisfied himself that the report was consistent with Petitioner's previous statements, he accepted the guilty pleas. In Ocanas, the defendant contended that the State breached it plea bargain [a contention not raised in this case]. Ocanas tendered guilty pleas based on a plea agreement with the government. Unlike the present case, the court did not become a party to the plea agreement and did not accept the pleas when tendered. Instead, he took the pleas under advisement, ordered a presentence investigation and set a date for sentencing. Prior to sentencing and before any acceptance of the guilty pleas by the court, the government secured a second indictment charging essentially the same offense contained in the original indictment, but the allegations expanded the time period of illegal activity and added some defendants. The critical distinction between Ocanas and this case is that in Ocanas the trial judge never indicated his intent to accept or reject the pleas when they were originally tendered, whereas in this case, the trial judge tentatively accepted the pleas and indicated that they would only be rejected for the reasons set forth above.

In conclusion, review by this Court is not warranted on the ground that this case is in conflict with cases of either the federal or state courts. Rule 17.

V.

THE PETITION SHOULD BE DENIED BECAUSE THE FACTUAL ISSUE RAISED BY PETITIONER DOES NOT RISE TO A CONSTITUTIONAL LEVEL.

Petitioner contends that he should have been permitted to withdraw his guilty pleas prior to their final acceptance because the trial judge specifically told him that he had a right to do so anytime before the court finally accepted them. The Court of Appeals reviewed the entire record and a majority (four judges) found that this remark had been directed to the co-defendant. In a dissenting opinion, three judges disagreed with the majority. This factual issue is not "important" for purposes of Rule 17, because it turned solely upon an analysis of facts. The abbreviated argument of Petitioner (Pet. 17-18) fails to shed any new light on the issue. In National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 503, 71 S.Ct. 453, 95 L.Ed. 479 (1951) the Court made it clear that this type of issue does not merit further review:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of noninterference where conclusions of Circuit

> Courts of Appeals depend on appreciation of circumstances which admit of different interpretations'".

Hence, this issue does not warrant review by this Court.

VI.

THE DECISION OF THE COURT OF APPEALS OF MARYLAND WAS FUNDAMENTALLY FAIR AND IN ACCORD WITH SOUND REASONS OF PUBLIC POLICY.

The Court of Appeals, interpreting Maryland Rules 731 and 733, correctly concluded that the procedure followed by the State trial judge complied with the provisions of those rules. Petitioner does not question that interpretation. The trial court made it clear on several occasions after the voluntary guilty pleas were tendered that an absolute right to withdraw them would arise only if they were not ultimately accepted by the court. Petitioner was afforded a full and fair hearing, at the trial level when, for other reasons, he sought to withdraw his pleas. Throughout the trial proceedings, Petitioner was never under any illusion that he had a absolute right to withdraw the pleas. Indeed, he stated at one point during the hearing on the motion to withdraw the pleas that "I realize it may be too late to change anything. I knew there were no guarantees." (T. 53). As the opinion of the Court of Appeals reflects, the trial court leaned over backwards to ensure that the Petitioner understood his constitutional rights and was able to intelligently exercise or waive them.

CONCLUSION

Respondent respectfully requests that this Court deny the Petition for Writ or Certiorari in that there are no special or important reasons justifying the exercise of jurisdiction by this Court. No federal questions are involved. The issues are peculiar and not likely to recur in the future. One issue is factual in nature. The State court decision does not conflict with decisions or federal or state courts. The decision was fundamentally fair and in accord with sound reasons of public policy. Therefore, no public interest would be serverd by granting this Petition. For the foregoing reasons, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Appendix

IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1980

No. 120

NEIL BLINKEN,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

Appeal from the Circuit Court

of Queen Anne's County

(Clayton C. Carter, Judge)

Pursuant to Certiorari to the Court of

Special Appeals

APPELLANT's BRIEF

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IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1980

No. 120

NEIL BLINKEN,

Appellant,

v.

STATE OF MARYLAND,

Appellee

APPEAL FROM THE CIRCUIT COURT

OF QUEEN ANNE'S COUNTY

(Clayton C. Carter, Judge)

PURSUANT TO CERTIORARI TO THE COURT

OF SPECIAL APPEALS

APPELLANT'sBRIEF

STATEMENT OF THE CASE

The Appellant, Neil Blinken, was charged with multiple violations of the Controlled Dangerous Substances law of Maryland. On November 1, 1979, he appeared before the Honorable Clayton C. Carter and, pursuant to a plea agreement reached with the State, tendered pleas of guilty to Counts 1, 2, 3

and 4 of Indictment No. 2052. The pleas were tentatively, but not finally, accepted pending the completion of a pre-sentence investigation. On January 3, 1980, Appellant appeared for sentencing and, after a motion to withdraw his guilty pleas was denied, was sentenced to a term of imprisonment of ten years and fined $50,000.00. An appeal was timely noted with the Court of Special Appeals, which upheld the trial court's denial of Appellant's motion to withdraw his guilty plea. Upon Appellant's petition, this Court granted certiorari.

QUESTIONS PRESENTED

I. Whether the trial court abused its discretion by prohibiting Appellant from withdrawing a tendered guilty plea which had not been finally accepted by the trial court?

II. Whether the trial court, which had tentatively, but not finally accepted Appellant's tendered guilty plea pending outcome of a pre-sentence investigation report, abused its discretion by prohibiting Appellant from withdrawing the guilty plea prior to the trial court's final acceptance after telling Appellant he would be allowed to withdraw the plea anytime before the trial court finally accepted it?

III. Whether in the interest of justice, the trial court, in any event, should have permitted withdrawal?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Maryland Rules of Procedure

Rule 731 (f)(1) - Withdrawal of Plea before Sentencing.

When justice requires, the court may permit a defendant to withdraw a plea of guilty or nolo contendere and enter a plea of not guilty at any time before sentencing.

Rule 733(c) - Plea Agreements - Agreements on Sentence, Disposition or Other Judicial Action.

1. Presentation to the Court.

If a plea agreement has been reached pursuant to subsection a6 of this Rule for a plea of guilty or nolo contendere which contemplates a particular sentence, disposition or other judicial action, the defense counsel and the State's Attorney shall advise the judge of the terms of the agreement when the defendant tenders the plea. The judge may accept or reject the agreement or may defer his decision as to acceptance or rejection until after the pre-sentence proceedings and investigation he deems necessary.

2. Not Binding on the Court.

The agreement of the State's Attorney relating to a particular sentence, disposition or other judicial action is not binding on the court unless the judge to whom the agreement is presented accepts it.

3. Acceptance of Plea Agreement.

If the judge accepts the plea agreement, he shall accept the defendant's plea in open court and embody in his judgment the agreed sentence, disposition or other judicial action encompassed in the agreement, or with the consent of the

parties, a disposition more favorable to the defendant than that provided for in the agreement.

4. Rejection of Plea Agreement.

If the judge rejects the plea agreement, he shall inform the parties of this fact and shall advise the defendant: that the court is not bound by the plea agreement; that the defendant may withdraw his plea; and that if the defendant persists in his plea of guilty or nolo contendere the sentence or other disposition of the case may be less favorable to him than the plea agreement. If the defendant persists in his plea, the court may accept the plea of guilty only pursuant to section c of Rule 731 (Pleas) and a plea of nolo contendere only pursuant to section d of Rule 731 (Pleas).

5. Withdrawal of Plea.

If the defendant withdraws his plea and enters a plea of not guilty, then upon the objection of the defendant or the State made at that time, the judge to whom the agreement was presented may not preside at a subsequent court trial of the defendant on any charges involved in the rejection plea agreement.

STATEMENT OF FACTS

Petitioner Neal Blinken, was indicted on multiple violations of the Controlled Dangerous Substances law of Maryland (E.71). He and his co-defendant, Kari Lou Pfau, appeared before the Circuit Court for Queen Anne's County on November 1, 1979 (E.71). On the basis of a plea agreement reached with the State, they tendered please of guilty to charges of (1) possession of mari-

juana in sufficient quantity to indicate an intent to distribute, (2) possession of marijuana, (3) possession of cocaine and (4) keeping and maintaining a public nuisance, that is, a dwelling house used by drug abusers as a location in which to administer controlled dangerous substances (E. 1-35, 71-72). Ms. Pfau also tendered a guilty plea to a fifth count of conspiracy to distribute marijuana (E. 1-35, 72).

In return for Petitioner's plea of guilty to the above counts, the State agreed that Ms. Pfau[1] would be given a ten-year suspended sentence, 5 years probation, a $10,000.00 fine and that Petitioner would receive a sentence of ten years imprisonment and a $50,000.00 fine (E. 13, 18-19, 72). The State also agreed to enter a nolle prosequi on the remaining conspiracy counts lodged against Petitioner and Ms. Pfau (E. 14, 18, 72).

After Petitioner tendered his guilty plea and the plea agreement was presented to the trial court, the trial court stated that it was accepting the pleas "tentatively, but not finally," pending the outcome of a pre-sentence investigation report (E. 24,25,35). The trial court also stated, "You still have a right to withdraw your plea, if you care to do so, anytime before the court finally accepts it."[2] (E.35). The

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[1]Petitioner was engaged to Ms. Pfau at the time he tendered his guilty plea (E.33). They are now married.

[2]Although the trial court was speaking to Ms. Pfau at the time it uttered the above sentence, it is clear from the context of the November 1, 1979 hearing that its words were intended for Petitioner, as well as, Ms. Pfau.

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court requested that the pre-sentence investigation report be completed by December 15, 1979 and scheduled a sentencing hearing for January 3, 1980 (E. 37,38).

Prior to the completion of the pre-sentence investigation report, the trial court, on December 12, 1979, received a letter from Petitioner indicating that he wished to withdraw his guilty plea and preserve his right of appeal[3] (E. 44). Petitioner renewed his request to withdraw this guilty plea at the January 3, 1980 hearing (E. 47). He remphasized his desire to preserve his appellate rights[4] and stated that he felt coerced into pleading guilty because the State used his co-defendant and fiancee, Ms. Pfau, as a lever against him (E. 47). Petitioner explained that the only reason he plead guilty was to insure that Ms. Pfau would receive a lenient sentence (E. 47-49). The court overruled the motion, stated that it "now finally accepts the plea agreement" and sentenced Petitioner according to the plea agreement he reached with the State (E. 61-62).[5]

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[3] The completed pre-sentence investigation report also reflected Petitioner's desire to withdraw its guilty plea (E.44).

[4] The docket entries reflect that Petitioner filed two Motions to Suppress, one having been granted (suppression of a wiretap) and one having been denied (suppression of a search and seizure warrant).

[5] Although there is little disagreement between the parties as to the facts of this case, the parties have agreed to include within the extract the entire transcript of the November 1, 1979 and January 3, 1980 hearings since it is only 70 pages and will allow the court to review in detail exactly what transpired during those hearings. Additionally, although the parties have agreed on the contents of the record extract, the parties have also stipulated that should the State, in preparing its brief, find that the record extract lacks some information relevant to its brief, it is free to include such information in an appendix to its brief.

ARGUMENT

I. The trial court abused its discretion by prohibiting Appellant from withdrawing a tendered guilty plea which had not been officially accepted by the trial court.

A. A guilty plea which is tentatively, but not finally, accepted by the trial court is not an officially accepted guilty plea.

Md. rule 733 (c)(1) provides that upon the tender of a guilty plea and the presentation of a plea agreement, the judge may accept or reject the agreement or defer his decision as to acceptance until after the pre-sentence proceedings have been completed. Neither Md. rule 733 nor Md. rule 731 provides for a tentative acceptance of a guilty plea. It is clear then, that the judge, although stating he was tentatively accepting Appellant's tendered guilty plea pending outcome of the pre-sentence investigation, was actually defering his decision as to acceptance until the pre-sentence investigation could be completed. Simply put, the deferred acceptance of a tendered guilty plea cannot be considered an officially accepted guilty plea. State v. Lockridge, 269 N.W. 2d. 902 (Minn. 1978); Stowers v. State, 363 N.E. 2d. 978 (Ind. 1977). See also State v. Genereux, 272 N.W. 2d. 33 (1978). This conclusion is in fact supported by the language of Md. rule 733 (c)(3), which provides in pertinent part, "If the judge accepts the plea agreement, he shall accept the defendant's plea in open court . . . . " since it indicates that the trial court should not actually accept the defendant's tendered guilty plea until it has already accepted the plea agreement. See State v. Genereux, 272 N.W. 2d 33 (1978).

B. A defendant has an absolute right to withdraw a tendered guilty plea which has not been officially accepted by the trial court.

Md. Rule 731 (f)(1) provides in essence that the defendant's right to withdraw a guilty plea lies within the sound discretion of the trial court. Fontana v. State, 42 Md. App. 203, 399 A.2d 950 (1979); However, a reading of the entire rule can leave no doubt that Md. Rule 731 (f)(1) pertains only to a guilty plea which has actually been accepted by the trial court. Thus, until the court has actually accepted a tendered guilty plea, the defendant should be completely free to withdraw it. This conclusion was in fact reached in Brockman v. State, 27 Md. App. 682, 684, 341 A.2d, 849, 851, aff'd 277 Md. 687, 357 A.2d 376(1976) where the court stated, "Clearly at no point prior to the entry of the plea[6] can the accused be compelled to perform specifically, i.e., to plead guilty." See also Allen v. Walter, 534 S.W. 2d. 453 (Ky. 1976).[7] Indeed, since the trial court is under no obligation to accept a tendered guilty plea, Kisamore v. State, 286 Md. 654, 409 A.2d 719 (1980) basic fairness to the defendant be given the same freedom to withdraw a tendered guilty plea as the trial court has to accept or reject it. The trial court, therefore, abused its discretion in prohibiting Appellant from withdrawing a tendered guilty plea which it had not officially accepted.

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[6]It is clear under Md. Rule 731 that a guilty plea is not entered until it is accepted by the court. See State v. Waldman, 57 Wis. 2d. 234, 203 N.W. 2d. 691 (1973).

[7]Although not faced with the issue presently before this Court, a number of courts have recognized that it is only after a guilty pleas has actually been accepted by a trial court is its withdrawal addressed to discretion of the court. See, for example, State v. Elledge, 13 N.C. App. 462, 186 S.E. 2d. 192 (1972); State v. Hicastro, 41 N.J. Super. 484, 125 A.2d 433 (1956). Moreover, at least one court of last resort has by court rule clarified that a defendant has an absolute right to withdraw a guilty plea prior to its acceptance by the trial court. Michigan GCR 1963, 785.7 (6)(a).

II. The trial court, which had tentatively, but not finally, accepted Appellant's tendered guilty plea pending outcome of a pre-sentence investigation report, abused its discretion by prohibiting Appellant from withdrawing the tendered plea prior to the trial court's final acceptance after telling Appellant he would be allowed to withdraw the plea anytime before the trial court finally accepted it.

The trial court's statement that Appellant would be allowed to withdraw its plea anytime before the court finally accepted it quite conceivably led the Appellant to believe that he could withdraw the plea prior to the trial court's final acceptance. The trial court's subsequent refusal to allow Appellant to withdraw his tendered guilty plea prior to the court's final acceptance of the plea constitutes a clear abuse of discretion. State v. Griffin, 238 N.W. 2d 780 (Iowa 1976); People v. Morales, 17 A.D. 2d 999, 234 N.Y.S. 2d 92 (1962).

III. In the interests of justice the trial court, in any event, should have permitted withdrawal.

The facts of this case demonstrate that Appellant was entitled, in the interests of justice, to withdraw his guilty plea and that the trial court abused its discretion in refusing Appellant's request to do so. Initially, the withdrawal of Appellant's guilty plea would not have inordinately prejudiced the State or inconvenienced the court. See, Mathias v. State, 284 Md. 22, Cohen v. State, 235 Md. 62, 200 A.2d 368 (1964), Fontana v. State, 42 Md. App. 203, 399 A.2d 950 (1979). Unlike Fontana v. State, supra, there was no showing that Appellant was merely attempting to delay this case. In fact, the case was

heard on the original trial date of November 1, 1979. Moreover, there was no showing that the State's witnesses were inconvenienced or brought to the court only to be excused at the last moment. Although the State's Attorney stated that the State Police expended 220 to 250 man hours in preparing the case, (E. 57) the time put in by the State Police was primarily involved in the investigatory stage of the case and had already been expended prior to any charges having been filed. The expense of the jury was minimal.

Additionally, Appellant provided the trial court with a fair and just reason for allowing him to withdraw his guilty plea, i.e., the preservation of appellate rights. Cf. Charles v. State, 1 Md. App. 222, 228 A.2d 620 (1967). Moreover, Appellant indicated in his testimony during the January 3, 1980 hearing that, if he was allowed to withdraw his guilty plea and proceed to trial, he was agreeable to proceeding on a not guilty plea with the evidence being presented by way of a statement of facts (E. 48) which certainly would not have put the State or its witnesses to any additional expense. The trial court, however, refused to allow Appellant to withdraw his plea because it found that ". . . as [Appellant] got near the date of sentencing he began to engage in what the Supreme Court has termed 'gamemanship of a most offensive nature.'" (E. 59) The court, in discussing its decision stated:

> in a recent Maryland case of Sweetwine v. State, the Court, in speaking through Judge Moylan, said, may a defendant strike a bargain with the state and repudiate that bargain so far as his obligations under it are concerned and yet retain all of the advantages he ostensibly

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> bargained for, and to put that paraphrase the Court would say, may Neal Blinken strike a bargain with the state that his girlfriend would not go to prison for any implication in the crimes involved or alleged crimes involved and then repudiate that bargain so far as the obligations under it are concerned and yet retain all the advantages he ostensibly bargained for, which were not only that Miss Pfau would not go to prison but also other charges against him with Queen Anne's County would be dismissed or nul-prossed; then thirdly that he would not receive the maximum sentence under the law.
>
> Judge Moylan in answer to the question said, the answer is immediate and absolute, "No." (E.59-60)

The court's finding that Appellant, if allowed to withdraw his plea, would nonetheless have retained all of the benefits of the plea agreement is clearly erroneous. Initially, if Appellant had been allowed to withdraw his plea, he obviously would have had to face the Queen Anne's County charges as well as the possibility of receiving the maximum sentence under the law for the charges lodged against him. Miller v. State, 272 Md. 249, 322 A.2d 527 (1974); Sweetwine v. State, 72 Md. App. 1, 398 A.2d 1262 (1979). Moreover, as to Kari Pfau, the trial court could easily have ruled that she and Appellant entered into a single plea agreement with the State, and that if the trial court were to allow Appellant to withdraw his guilty plea, the entire plea agreement would have to be voided, including the sentence which Ms. Pfau was to receive. Indeed, the court rejected Appellant's contention that his and Miss Pfau's plea agreements were independent of each other (E. 53-54). Since the trial court's refusal to allow Appellant to withdraw his guilty plea was based on a clearly erroneous finding, the court abused its discretion in

denying Appellant's motion to withdraw his plea, especially when allowing withdrawal would not have prejudiced or inconvenienced the State or the court.[8]

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that his conviction be reversed.

Respectfully submitted,

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[8]The Court of Special Appeals upheld the trial court's ruling because its "examination of the record uncovers none of the egregrious circumstances which have previously warranted an overturning of a judge's discretionary ruling. (E. 75) However, in light of the trial court's erronecus findings discussed above, such circumstances do in fact exist in this case.

IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 1980

NO. 13

NEAL BLINKEN,

Appellant

v.

STATE OF MARYLAND,

Appellee

APPEAL FROM THE CIRCUIT COURT
FOR QUEEN ANNE'S COUNTY
(Clayton C. Carter, Judge)

APPELLANT'S BRIEF AND APPENDIX

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IN THE

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APPEAL FROM THE CIRCUIT COURT
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APPELLANT'S BRIEF
AND APPENDIX

STATEMENT OF CASE

The Appellant was charged with multiple violations of the Controlled Dangerous Substances law of Maryland. On November 1, 1979, he appeared before the Honorable Clayton C. Carter and entered pleas of guilty to Counts 1, 2, 3, and 4 of Indictment No. 2052. The pleas were provisionally

accepted and a pre-sentence investigation was ordered. On January 3, 1980, the Appellant appeared for sentencing and after a motion to withdraw his guilty plea was denied, was sentenced to a term of imprisonment of ten (10) years and fined $50,000.00. An appeal was timely noted.

QUESTIONS PRESENTED

1. Did the Court abuse it's discretion in denying Appellant's request to withdraw his guilty plea prior to sentencing?

2. Was the Appellant fully advised of the nature of the charges against him?

3. Was Appellant's plea of guilty free and voluntary?

STATEMENT OF FACTS

On November 1, 1979, the Appellant appeared before the Honorable Clayton C. Carter in the Circuit Court for Queen Anne's County. He appeared with his co-defendant, Kari Lou Pfau. Kari Lou Pfau did not enter an appeal. Pleas of guilty were entered to the first four counts of Indictment No. 2052. The Court inquired of the Appellant Neal Blinken as to whether he understood each of the charges against him. (T.7) The Court advised the co-defendant, Kari Lou Pfau, that she was charged with having in her possession a controlled dangerous substance, to wit; marijuana, in sufficient quantity to reasonably indicate under all circumstances

an intent to distribute that controlled dangerous substance. The Court advised her that the second count charged her with possession of marijuana, the third count charged her with possession of cocaine and the fourth count charged her with keeping and maintaining a common nuisance, a dwelling house, and a place in Kent Island which is and has been resorted to by drug abusers for purposes of illegally administering controlled dangerous substances. (T.7-8)

In advising the Appellant of the nature of the charges against him, the Court stated that they are the same as those indicated in the case of Ms. Pfau. (T.8) The Appellant stated that he understood. (T.8)

The Appellant stated his version of the plea agreement. Part of and an essential ingredient of the plea agreement was that his co-defendant, Kari Lou Pfau, would be given a ten (10) year suspended sentence, five (5) years probation and a $10,000.00 fine. (T.16) The Court further advised both Defendants that even though they may be guilty of a crime or crimes with which they stand charged, they have a right to plead not guilty to such charges and may elect to be tried by a judge or jury of twelve (12) persons; and require the State to prove its case against them beyond a reasonable doubt to the judge in the case you elect a court trial and to every member of the jury if you elect to be tried before a jury since the verdict of the jury must be unanimous. (T.20) The pleas were provisionally accepted

pending the receipt of a pre-sentence investigation.

On December 12, 1979, the Appellant wrote a letter to Judge Carter indicating that he did not wish to pursue the guilty plea and also wished to preserve his appellate rights.

On January 3, 1980, the Appellant appeared for sentencing and through counsel moved to withdraw his guilty plea. The Appellant testified that he had written Judge Carter on December 12, 1979 stating to him that he was not satisfied with his plea arrangement and wished to withdraw his plea and preserve his appellate rights. (T.48) The Appellant explained that the reason he originally plead guilty was because there was a great psychological pressure placed upon him. He believed he was coerced into pleading guilty by using the plea agreement of his co-defendant and fiancée' as a lever against him. (T.50) He stated that the only reason he plead guilty was the consideration given to his co-defendant. (T.50) He testified that he did not believe it was right to use an individual who has their own constitutional rights and their own personality, their own life, their own being, to use them against another person as a force to take out the State's will on another person. (T.52) He stated that on November 1, 1979, when he entered a plea of guilty, he was in a state of shock. He was forced emotional intellectually, and physically by the repetity of the events

taking place. (T.52) The letter of December 12, 1979 to Judge Carter was introduced into evidence as Court's Exhibit No. 1. The State's Attorney stated that the State Police expended 220 to 250 man hours in preparing the case. (T.60)

The Court overruled Appellant's motion to withdraw his guilty plea and sentenced him accordingly.

ARGUMENT

I. THE COURT ABUSED IT'S DISCRETION IN DENYING APPELLANT'S REQUEST TO WITHDRAW HIS GUILTY PLEA PRIOR TO SENTENCING.

Maryland Rule 731 f.1. states:

> "Where justice requires, the Court may permit a defendant to withdraw a plea of guilty at any time before sentencing."

There is nothing in the record to indicate that the acceptance of the guilty pleas of the two defendants were mutually dependent. The pleas were provisionally accepted subject to a pre-sentence investigation verifying counsel's representations as to each of the defendants backgrounds. Conceivably, the pre-sentence investigation would confirm as to one defendant but not as to the other. This would not preclude the acceptance of the plea agreement as to the one defendant whose background was verified to the Court's satisfaction while rejecting the plea agreement as to the other.

The right to withdraw a guilty plea is based upon the discretion of the Court. Fontana v. State, 42 Md.App. 203. However, there is no defined limitation of what will burst the presumptive bubble that the trial judge has properly exercised his discretion in permitting or denying withdrawal. Fontana v. State, supra.

In the instant case, the Appellant wrote to Judge Carter in December, 1979 stating that he believed he had been coerced into entering his guilty plea. The various reasons are set forth in Court's Exhibit No. 1. He maintained that he wished to preserve his appellate rights. On January 3, 1980, the Appellant further testified as to the various reasons for his request for the withdrawal of his guilty plea. After hearing all of the testimony, Judge Carter denied Appellant's request.

Appellant maintains that under the facts of this case, the Court abused its discretion in not allowing withdrawal of his guilty plea. Unlike Fontana v. State, supra, there was no showing by the State of numerous efforts by Appellant to delay this case. The case was heard on the original trial date of November 1, 1979. Additionally, there was no showing by the State that witnesses were inconvenienced and brought from other states on numerous occasions only to be excused at the last moment. The statement by the State's Attorney as to the time expended by the Maryland State Police dealt

primarily with the investigatory stage of the case and had already been expended prior to any charges having been filed. The expense of the jury was minimal.

In Cohen v. State, 235 Md.62, the Court upheld the trial judge's refusal to allow the withdrawal of a plea of nolo contendere where the Defendant had (1) forced the judge to set a trial date and enter a plea of not guilty after he had refused to plead to any of the charges against him; (2) caused the trial to be postponed due to the filing of preliminary motions; (3) entered a nolo contendere plea at the hearing on the preliminary motions; and (4) attempted to withdraw his plea on the date of sentencing.

Appellant maintains that justice required the allowance of him to withdraw his guilty plea and the Court abused its discretion in refusing his request. The primary reason for requesting the withdrawal was the preservation of appellate rights. The docket entries reflect two Motions to Suppress having been filed, one having been granted (suppression of a wiretap) and one having been denied (suppression of a search and seizure warrant). There was no showing by the State of any efforts by Appellant to delay the case nor any showing of any inordinate prejudice to the State as in Fontana v. State, supra.

If the case was tried it involved primarily testimony as to what was seized in the execution of a search and seizure

warrant. In fact, the Appellant indicated in his testimony that he was amicable to proceeding on a not guilty plea with the evidence being presented by way of a statement of facts (T.51) which certainly would not have put the State to any additional expense.

Preservation of appellate rights is a fundamental due process claim, in this case arguably meritorious, and under all the circumstances, justice required that Appellant's request to withdraw his guilty plea should have been permitted.

II. THE APPELLANT WAS NOT FULLY ADVISED OF THE NATURE OF THE CHARGES AGAINST HIM.

The Appellant contends that the acceptance by the Court of his plea of guilty was invalid because he was not thoroughly advised of the nature of the charges against him pursuant to Maryland Rule 731 3.c. The wording of the indictment was read to his co-defendant, Kari Lou Pfau, however, the essential elements of the various offenses were not explained. The first count of the indictment charging possession with intent to distribute marijuana was not explained at all. The Appellant was not advised of the elements of proof required by the State to sustain this charge nor the elements of the charge itself. In addition, the elements of the other charges were not sufficiently explained to him other than they constituted possession of controlled dangerous substances and maintaining of a common nuisance.

Irrespective of the fact that the Appellant was a college graduate and could read and write the English language, it was still incumbent upon the Court to comply with Maryland Rule 731 3.c. and fully inquire of the Appellant his understanding of the nature of the charges against him.

III. APPELLANT'S PLEA OF GUILTY WAS NOT FREE AND VOLUNTARY.

It is apparent from the testimony and statements made at the hearings on November 1, 1979 and January 3, 1980 that the Appellant's plea of guilty was made because his co-defendant and fiancee' was to be given a suspended sentence and a period of probation. This was the coercion for him to enter his guilty plea which he now believes was wrong and he is presently trying to rectify.

Appellant recognizes that there is always some degree of coercion in a guilty plea whether it be for a lesser sentence or a dismissal of other charges but Appellant maintains that that degree of coercion should be tempered with fundamental fairness and a defined degree of due process.

Appellant contends that his right to due process was denied by using the freedom or the threat of the lack of freedom of a loved one (his co-defendant) as an inducement for him to plead guilty. Appellant maintains that the boundaries for proper coercion were crossed in this case and this improper coercion renders his guilty plea null and void.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that his convictions be reversed.

Respectfully submitted,

Phillip M. Sutley
Attorney for Appellant

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entered into this plea. There was a careful recitation of the facts in the matter by the state police. We feel he should not be able to withdraw it at this time.

MR. SUTLEY: Your Honor, apparently the police are prepared for the case already. I think if the case is tried it is not going to be lost time. I would hate to see dollar figures put on people's pleas, but, Your Honor, I would ask the Court not to accept Mr. Blinken's plea, or guilty plea. I think he stated on the record his reasons for that.

I ask Your Honor to accept Miss Pfau's plea agreement and let justice be served in this case.

THE COURT: All right.

Gentlemen, the Court has found no appellate decision that is entirely like the facts in this situation fac the Court at the moment.

The Court does point out that, as it has earlier that in Bordenkircher v. Hayes the Supreme Court of the Un States indicates that acceptance of the basic legitimacy c plea bargaining necessarily implies rejection of any notic that a guilty plea is involuntary in a constitutional sen simply because it is the end result of the bargaining pro

The Court is satisfied that the decision that M Blinken made was after he had the benefit of counsel whic one of the things that the Supreme Court of the United St has been concerned with, whether or not the plea of guilt

voluntarily made and tendered. In Bordenkircher it said it must reflect the choice of the defendant. He made that choi in the opinion of the Court knowingly, intelligently and at the time I am satisfied voluntarily.

I think he fully understood and appreciated the consequences. I am satisfied that as he got near the date o sentencing he began to engage in what the Supreme Court has termed "gamemanship of a most offensive nature."

In the case of U.S. vs: William McCann, it's a Second Circuit decision, and in a recent Maryland case of Sweetwine vs. State, the Court, in speaking thru Judge Moyl said, may a defendant strike a bargain with the state and repudiates that bargain so far as his obligations under it are concerned and yet retain all of the advantages he ostensibly bargained for, and to put that paraphrase the Cour would say, may Neal Blinken strike a bargain with the state that his girlfriend would not go to prison for any implication in the crimes involved or alleged crimes involved, and then repudiate that bargain so far as the obligations under it are concerned and yet retain all the advantages he ostensibly bargained for, which were not only that Miss Pfau would not go to prison but also other charges against him with Queen Anne's County would be dismissed or nul-prossed then thirdly that he would not receive the maximum sentence under the law.

Judge Moylan in answer to the question said, the answer is immediate and absolute, "No." Bargaining in bad faith will not be countenanced let alone rewarded on either side of the trial table. Appropriate are the words of Justi Cordoza who said, "Justice though due to the accused is due to the accuser also."

We are to keep the balance true, and then cited Schnider vs. Massachusetts. The Court went on to say in ths case of Sweetwine vs. State -- in the context of negotiating the stated plea of guilty the whole package of reciprocal arrangement and obligations is carnal. The condition is continuing good health of the guilty plea.

Then the Court goes on to say the legitimacy of consideration to go to trial rather than plead guilty as objective reason for imposing a different less lenient sentence and was further annunciated in U.S. vs. Anderson.

As I indicated to Mr. Blinken, the Courts have indicated, Supreme Courts have indicated, that to avoid the serious consequences of a guilty finding by a jury or a court that is the reason for plea negotiations and the Cou in Sweetwine vs. State and Supreme Court cases indicated t if this gamemanship will permit it under honest, sincere p negotiations that it would have a chilling affect upon the institution of plea bargaining. This is what they say. There is also a broad question at stake. If the prosecutc

cannot rely upon a plea bargaining arrangement, the potentia chilling affect upon the very institution of plea bargaining could be devastating.

I think this is certainly apropos in this case. I the nutshell, the appellant will relate that to Neal Blinken with his initial guilty plea about leniency and then stop payment on the check because you want your girlfriend to hav the benefit of her plea agreement, but he wants out of his, and I am satisfied that what he has done is simply gameman-ship in order to have the state locked in, having to carry out a plea agreement with Miss Pfau which was also made, as far as the Court is concerned, knowingly, intelligently and voluntarily.

For this reason the Court is satisfied that at th time that the plea agreement was made and tendered it was done sincerely and honestly. It was only after the chillin affect of prison sentence of ten years began to stare him i the face that the defendant felt, that Blinken felt that he should write this letter to the Judge,which had been offere here in evidence.

The PSI reports which have been submitted to the Court and counsel bear out the representations which were made to the Court at the time the plea agreement was tende on November 1st. The Court now finally accepts the plea agreement and will impose the sentences provided for under

the plea agreement.

Are you ready, gentlemen, for sentencing?

MR. BRADEN: State is ready, Your Honor.

THE COURT: The Court is not going to permit -- maybe we should put this on the record, will not permit the withdrawal of the plea, although the Court is aware that Maryland Rule 733, I am sorry, 731(f) does provide that the Court may permit withdrawal of a plea of guilty and enter a plea of not guilty at any time before sentencing when justic requires.

For the reasons set forth by our Supreme Court an the Sweetwine decision the Court does not feel justice requires the withdrawal of the plea in the case of Blinken at this time.

Now is there anything you wish to say before I impose sentance, gentlemen?

MR. BRADEN: State has nothing to say, Your Honor

THE COURT: The Court is required to give the defendant the right of elocution, of course, and defense counsel. Does Mr. Blinken or his counsel wish to say anything further?

MR. BLINKEN: Your Honor, I still maintain that would like to withdraw my plea, and it wasn't for the reas as cynical as perhaps it may look on the surface but due t a genuine gut feeling that I was being coereed out of my

Rule 731. Pleas.

a. *Types of Pleas.*

A defendant may plead not guilty, guilty, or, with the consent of the court, *nolo contendere*. In addition to any of these pleas, the defendant may interpose the defense of insanity as permitted by law.

b. *Entering Pleas.*

1. Manner.

A plea of not guilty may be made on the record in open court or may be filed in writing by the defendant or his counsel. A plea of guilty or *nolo contendere* shall be tendered by the defendant personally on the record in open court, except that a corporate defendant may tender a plea of guilty or *nolo contendere* by counsel or a corporate officer. The defense of insanity shall be interposed in writing by the defendant or his counsel and shall allege that the defendant was insane at the time of the commission of the offense charged.

2. Time.

The defendant's initial plea shall be made within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 723 (Appearance — Provision for or Waiver of Counsel). If a motion, demand for particulars, or other paper is filed requiring a ruling by the court or compliance by a party before entering a plea, the time for pleading shall be extended, without special order, to 15 days after the ruling by the court or the compliance by a party. A defense of insanity shall be interposed at the time the initial plea is made, unless good cause is shown.

3. Failure to Plead.

If the defendant does not plead within the time provided by this Rule, the clerk shall enter a plea of not guilty.

c. *Plea of Guilty.*

The court may not accept a plea of guilty without first questioning the defendant on the record to determine that the plea is made voluntarily, with understanding of the nature of the charge and the consequences of the plea. The court may accept the plea of guilty even though the defendant does not admit that he is in fact guilty if the court is satisfied that there is a factual basis for the plea. If the court refuses to accept a plea of guilty, the court shall enter a plea of not guilty.

d. *Plea of Nolo Contendere.*

1. When Permitted.

A defendant may enter a plea of *nolo contendere* only by leave of court. The court may not accept a plea of *nolo contendere* without first questioning the defendant on the record to determine that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.

The court may require the defendant or counsel to provide information it deems necessary to enable it to determine whether or not it will consent to the entry of this plea. If the court refuses to accept a plea of *nolo contendere*, it shall call upon the defendant to tender another plea.

2. Effect.

The plea of *nolo contendere*, if accepted by the court, has the effect of submitting the defendant to punishment by the court. Following the entry of a plea of *nolo contendere* the court shall proceed to determine and impose a sentence as on a plea of guilty, but without finding a verdict of guilty.

e. *Plea to a Degree.*

A defendant may enter a plea of not guilty to one degree and a plea of guilty to another degree of an offense which, by law, may be divided into degrees of guilt.

f. *Withdrawal of Plea.*

1. Before Sentencing.

When justice requires, the court may permit a defendant to withdraw a plea of guilty or *nolo contendere* and enter a plea of not guilty at any time before sentencing.

2. After Sentencing.

Upon motion of a defendant made within three days after the imposition of sentence the court may set aside the judgment and permit the defendant to withdraw his plea of guilty or *nolo contendere* if the defendant establishes that the provisions of sections c or d of this Rule were not complied with or there was a violation of a plea agreement entered into pursuant to Rule 733 (Plea Agreements).

3. Notice and Record of Proceedings.

The State's Attorney shall be given notice of the motion for withdrawal of the plea of guilty or *nolo contendere* and an opportunity to be heard thereon. Every hearing on withdrawal of a plea shall be on the record in open court.

4. That the State will not charge the defendant with the commission of certain other offenses;

5. That the State's Attorney will recommend, not oppose, or make no comment to the court with respect to a particular sentence, disposition, or other judicial action;

6. That the parties will submit a plea agreement proposing a particular sentence, disposition, or other judicial action to a judge for consideration pursuant to section c of this Rule.

b. *State's Attorney's Recommendations on Sentencing.*

The recommendation of the State's Attorney with respect to a particular sentence, disposition, or other judicial action made pursuant to subsection a 5 of this Rule is not binding on the court. The judge shall advise the defendant at or before the time the State's Attorney makes his recommendation that the court is not bound by the recommendation of the State's Attorney; that it may impose the maximum penalties provided by law for the offense to which the defendant pleads guilty; and that imposition of a penalty more severe than the one recommended by the State's Attorney will not be grounds for withdrawal of the plea.

c. *Agreements on Sentence, Disposition or Other Judicial Action.*

1. Presentation to the Court.

If a plea agreement has been reached pursuant to subsection a 6 of this Rule for a plea of guilty or nolo contendere which contemplates a particular sentence, disposition or other judicial action, the defense counsel and the State's Attorney shall advise the judge of the terms of the agreement when the defendant tenders the plea. The judge may accept or reject the agreement or may defer his decision as to acceptance or rejection until after the pre-sentence proceedings and investigation he deems necessary.

2. Not Binding on the Court.

The agreement of the State's Attorney relating to a particular sentence, disposition or other judicial action is not binding on the court unless the judge to whom the agreement is presented accepts it.

3. Acceptance of Plea Agreement.

If the judge accepts the plea agreement, he shall accept the defendant's plea in open court and embody in his judgment the agreed sentence, disposition or other judicial action encompassed in the agreement, or, with the consent of the parties, a disposition more favorable to the defendant than that provided for in the agreement.

4. Rejection of Plea Agreement.

If the judge rejects the plea agreement, he shall inform the parties of this fact and shall advise the defendant that the court is not bound by the plea agreement; that the defendant may withdraw his plea; and that if the defendant persists in his plea of guilty or *nolo contendere* the sentence or other

disposition of the case may be less favorable to him than the plea agreement. If the defendant persists in his plea, the court may accept the plea of guilty only pursuant to section c of Rule 731 (Pleas) and a plea of *nolo contendere* only pursuant to section d of Rule 731 (Pleas).

5. Withdrawal of Plea.

If the defendant withdraws his plea and enters a plea of not guilty, then upon the objection of the defendant or the State made at that time, the judge to whom the agreement was presented may not preside at a subsequent court trial of the defendant on any charges involved in the rejected plea agreement.

d. *Record of Proceedings.*

All proceedings pursuant to this Rule, including tender of the plea, advice by the court inquiry into the voluntariness of the plea or plea agreements, and inquiry into the factual basis for the plea shall be on the record. If the parties stipulate to the court that disclosure of the plea agreement or any term thereof would cause a substantial risk to any person of physical harm, intimidation, bribery, economic reprisal or unnecessary annoyance or embarrassment, the court may order that the record be sealed subject to terms it deems appropriate.

(Amended Nov. 16, 1978, effective Jan. 1, 1979.)